5-649

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 256.

J. C. DUNLAP, PLAINTIFF IN ERROR,

vs.

THE NORTH EASTERN RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED APRIL 22, 1886.

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1 GEORGIA, *Clarke County:*

To the superior court of said county:

The petition of J. C. Dunlap shows that the Northeastern Railroad Co., a corporation with its principal office in said county, has damaged him in the sum of fifteen thousand ($15,000.00) dollars by reason of the following facts:

Your petitioner was running an engine for defendant near Clarksville during the month of August, 1882, and while so engaged the engine was thrown from the track in consequence of the defective condition of the track and road-bed, one side of the track being low and loose and the curve of the track being too sharp.

Plaintiff was free from fault, and the accident resulted from the negligence of the defendant as hereinbefore stated.

By reason of said accident the entire body of plaintiff was crushed and one of his legs was almost paralyzed. Said injuries have caused him, still cause, and will always cause him, great pain and suffering. Said injuries have also deformed your petitioner.

Your petitioner was 34 years old, and was making one hundred and ten ($110.00) dollars per month, but said accident has entirely destroyed his capacity to work or earn money.

Wherefore your petitioner prays that process may issue requiring the Northeastern Railroad Co. to be and appear at the May term of the superior court of said county to answer this action for damages.

HOKE & BURTON SMITH,
Petitioner's Att'ys.

Filed in office this 10th day of Nov., 1883.
JOHN S. HUGGINS, *Clerk.*

GEORGIA, *Clarke County:*

J. C. DUNLAP *vs.* N. E. R. R. Co.

To the sheriff or his deputy of said county, Greeting:

2 The defendants are hereby required to be and appear, personally or by attorney, at the superior court to be holden in and for said county on the second Monday in May next, then and there to answer the petitioner's complaint in an action for damages, as in default thereof the said court will proceed as to justice shall appertain.

Witness the Honorable N. L. Hutchins, judge of said court, this 10th day of November, 1883.

JOHN S. HUGGINS, *Clerk.*

Due and legal service acknowledged and copy and all other service waived.
Nov. 12th, 1883.

GEO. D. THOMAS,
Att'y N. E. R. R. Co.

GEORGIA, *Clarke County:*

Before me, a N. P. & ex. of J. P. in and for said county, came Hoke Smith, who on oath deposes and says that he is attorney for J. C. Dunlap, and that, to the best of his knowledge and belief, the Northeastern Railroad Company is indebted to J. C. Dunlap in the sum of fifteen thousand dollars. Deponent further swears that suit has been brought for said amount for J. C. Dunlap against The Northeastern Railroad Company, returnable to the May term, 1884, of Clarke superior court, and that he apprehends the loss of said debt, or some part thereof, unless summons of garnishment do issue.

HOKE SMITH.

Sworn to and subscribed before me this 10th day of Nov., 1883.

J. G. EVANS,
N. P. & Ex. of J. P.

GEORGIA, *Clarke County:*

Know all men by these presents that we, J. C. Dunlap, principal, and J. J. Baldwin, security, are held and firmly bound unto the Northeastern Railroad Company, heirs and assigns, in the just and full sum of thirty thousand dollars; for the true payment of
3 which we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Signed, sealed, and dated this 10th day of Nov., 1883.

The condition of this bond is such that if the said J. C. Dunlap shall satisfy and pay all costs and damages that the said Northeastern Railroad Co. may sustain in consequence of the suing out of summons of garnishment, which said summons the said J. C. Dunlap is about to sue out in a suit pending in the superior court of said county, in the event he should fail to recover in the suit pending, then this bond to be void; else of full force.

J. C. DUNLAP. [L. S.]
HOKE SMITH, *Att'y.*
J. J. BALDWIN. [L. S.]

Test: J. G. EVANS,
N. P. & Ex. of J. P.

I have this day collected from plaintiff the amount of five and $\frac{85}{100}$ dollars for the within affidavit and bond and for issuing seventeen summons' of garnishment.

Nov. 10th, 1883.

J. G. EVANS,
N. P. & Ex. of J. P.

Served personally Jas. White, Talmadge Bros., C. G. Talmadge, J. E. Talmadge, Hodgson Bros., A. H. Hodgson, S. C. Dobbs, Athens City Water Works Company, by Geo. W. Foote, C. B. Chandler, Reaves, Nicholson & Co., John W. Nicholson, W. D. O'Farrell, Baldwin &

Burnett, C. W. Baldwin, W. B. Burnett, each with summons of garnishment in within-stated case.

Nov. 10th, 1883.

M. D. BROWNING, *Dep't. Sh.*

Served E. R. Hodgson and R. K. Reaves, each personally, with a summons of garnishment in within case Nov. 12th, 1883.

M. D. BROWNING, *Dep't. Sh.*

4 STATE OF GEORGIA, *Clarke County:*

Know all men by these presents that we, the Northeastern Railroad Company, as principal, and F. Phinizy, as security, acknowledge ourselves held and bound unto J. C. Dunlap, plaintiff in an action on the case now pending in Clarke superior court, in which said Northeastern Railroad Company is defendant, in the sum of thirty thousand dollars; for the true payment of which we bind ourselves, successors, heirs, administrators, and executors.

Witness our hands and seals this 12th day of November, 1883.

The condition of the above obligation is such that whereas the said J. C. Dunlap has filed his suit in Clarke superior court, for the sum of fifteen thousand dollars, against said Northeastern Railroad Company, and has sued out summons of garnishment directed to E. K. Childs, James White, Talmadge Bros., E. R. Hodgson, A. H. Hodgson, C. G. Talmadge, J. E. Talmadge, Hodgson Bros., The National Bank of Athens, S. C. Dobbs, Athens City Water Works Co., S. B. Chandler, Reaves, Nicholson & Co., R. R. Reaves, Jno.
5 W. Nicholson, W. D. O'Farrell, Baldwin & Burnett, C. W. Baldwin, W. B. Burnett, Geo. D. Thomas, all residents of said county, and said summons returnable to May term, 1884, of Clarke superior court:

Now, should the said Northeastern Railroad Company pay the judgment and costs which may be recovered by the said J. C. Dunlap in said action, then the above obligation to be void; otherwise of force.

THE NORTHEASTERN RAILROAD COMPANY, [L. S.]
By GEO. D. THOMAS, *Att'y.* [L. S.]
FERDINAND PHINIZY. [L. S.]
NORTHEASTERN RAILROAD CO.,
Per C. G. TALMADGE, *Vice-President.* [L. S.]

Test and approved.
JOHN S. HUGGINS, *Clerk.*

Filed in clerk's office, superior court, Nov. 12th, 1883.
JOHN S. HUGGINS,
Clerk S. C.

J. C. DUNLAP *vs.* N. E. R. R. Co.

Plaintiff amends his declaration and shows that at the time and place of the accident which caused his injury the rails were too light

and not properly laid, but were laid without being first bent and were left with "kinks" in them. Plaintiff further shows that the engine was too heavy and was not properly constructed to enable the engineer to control it in places such as the one where the accident happened.

Plaintiff shows that said rail and track and engine were not reasonably suited to the purposes of railroading nor were they fit for the service to which def't put them.

HOKE SMITH,
Pl'ff's Att'y.

Filed in office Nov. 10th, 1884.
JOHN S. HUGGINS, *Clerk.*

Service acknowledged and copy waived Nov. 1st, 1884.
GEO. D. THOMAS,
Def't's Att'y.

6 *Trespass.*

In Clarke Superior Court. November Term, 1884.

J. C. DUNLAP *vs.* N. E. R. R. Co.

And now comes the defendant, The Northeastern Railroad Company, and defends the force and injury when, &c., and for plea says it is not guilty of the supposed trespass in the plaintiff's declaration complained of, and of this it puts itself upon the country.

And for further plea in this behalf the defendant says that the plaintiff ought not to have and maintain his action, because defendant says that shortly after he, the plaintiff, received the injury complained of on the defendant's road, and while still in the employ of the defendant, the plaintiff stated to the defendant that he did not intend to sue this defendant for or on account of the injury aforesaid, and the defendant afterward, and relying upon the statements aforesaid of the plaintiff, paid his regular wages to the amount of thirteen hundred dollars while the plaintiff was engaged in no work for defendant, and also, at his special instance and request, paid out for him for board and medical attention the additional sum of six hundred dollars; wherefore and by reason of which facts the defendant says that plaintiff is estopped from suing and from maintaining this action; all of which the defendant is ready to verify.

GEO. D. THOMAS,
ALEX. S. ERWIN,
CARLTON & LUMPKIN,
Def't's Att'ys.

Filed in office Nov. 8th, 1884.
JOHN S. HUGGINS, *Clerk S. C.*

Petition.

Petition for removal on the ground of citizenship under the act of March 3, 1875, where the adversary parties are all citizens of different States and all the plaintiffs or all the defendants unite in the petition for removal.

In the Superior Court of Clarke County, State of Georgia.

J. C. DUNLAP, Plaintiff,

vs.

NORTHEASTERN RAILROAD COMPANY, Defendant.

Petition for removal to the circuit court of the United States, northern district of Georgia.

7 To the honorable the superior court of Clarke county, State of Georgia:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner at the time of the commencement of this suit — and still is — citizen of Arkansas, and that the Northeastern Railroad Company was then and still is a citizen of the State of Georgia, being a corporation incorporated by said State, with the principal office in said State. Your petitioner further shows that this is the first term at which said case could be tried.

And your petitioner offers herewith a good and sufficient surety for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Georgia; and he will ever pray.

HOKE & BURTON SMITH,
Attorneys for Petitioner.

STATE OF GEORGIA, *County of Fulton:*

I, Hoke Smith, being duly sworn, do say that I am a member of the firm of Hoke & Burton Smith, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and
8 allegations therein contained are true, as I verily believe.

——— ———.

Subscribed by the said Hoke Smith in my presence *by* and by him sworn to before me this 8th day of Nov., A. D. 1884.

J. M. JENKINS, [L. S.]
N. P., F. C., Ga.

Filed the 10th day of Nov., 1884.

JOHN S. HUGGINS, *Clerk.*

Bond.

Bond for the removal of a cause under the act of March 3, 1875.

Know all men by these presents that J. C. Dunlap, as principal, and A. P. Stewart, as surety, are held and firmly bound unto the Northeastern Railroad Company in the penal sum of five hundred dollars; for the payment whereof, well and truly to be made unto the said Northeastern Railroad Co., heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said J. C. Dunlap having petitioned the superior court of Clarke county, State of Georgia, for the removal of a certain cause therein pending, wherein J. C. Dunlap is plaintiff and Northeastern Railroad Company is defendant, to the circuit court of the United States in and for the northern district of Georgia:

Now, if the said J. C. Dunlap, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 8th day of Nov., A. D. 1884.

J. C. DUNLAP. [L. S.]
A. P. STEWART. [L. S.]

Executed before me the day and year written.

[L. S.]

J. M. JENKINS,
Notary Public, F. C., Ga.

9 STATE OF GEORGIA, *County of Fulton:*

I, A. P. Stewart, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Georgia and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Georgia liable to execution of the value of more than five hundred dollars.

——— ———.

Subscribed in my presence by A. P. Stewart and by him sworn to before me this 8th day of Nov., A. D. 1884.

J. M. JENKINS,
N. P., F. C., Ga.

Filed the 10th day of Nov., 1884.

JOHN S. HUGGINS, *Clerk.*

GEORGIA, *Clarke County:*

The bond in the within-stated case for the removal of the same is hereby approved. The clerk of the superior court is ordered to transcribe and transmit the papers in said case, as the law requires.

In open court this Nov. 10th, 1884.

N. L. HUTCHINS,
Judge Sup'r. Court, W. C.

HOKE & BURTON SMITH,
Pl'ff's Att'ys.

GEORGIA, *Clarke County:*

J. C. DUNLAP *vs.* NORTHEASTERN RAILROAD CO.

Damages in the superior court of Clarke county, Ga.

CLERK'S OFFICE, SUPERIOR COURT, SAID COUNTY.

I, John S. Huggins, clerk of said court, do certify that the within and foregoing is a true and complete transcript of the record in the above-stated case.

Witness my hand and official seal this 11th day of December, 1884.

[L. S.] JOHN S. HUGGINS, *Clerk S. C.*

Filed Dec. 12th, 1884.

A. E. BUCK, *Clerk.*

10 *Verdict.*

We, the jury, find for the plaintiff in the sum of seven thousand five hundred dollars ($7,500.00).

Atlanta, Ga., March 31st, 1885.

A. L. WHITESIDE, *Foreman.*

Garnishment having been dissolved in this case by the execution of bond, with Ferdinand Phinizy as security, judgment is rendered in favor of the pl'ff against the Northeastern Railroad Company, principal, and Ferdinand Phinizy, security, in the sum of seven thousand and five hundred dollars, principal, and — dollars, costs of suit, this April 2nd, 1885.

HOKE SMITH, *Pl'ff's Att'y.*
O. C. FULLER, *Dep't. Cl'k.*

Judgment entered page 322 minutes.
Filed April 2nd, 1885.

Trial March 31st, and Verdict for Plaintiff for Seventy-Five Hundred Dollars.

J. C. DUNLAP *vs.* THE NORTHEASTERN R. R. Co.

Case in circuit court U. S.

And now, during the term in which said verdict was rendered and within three days from the publication thereof, comes the defendant, The Northeastern Railroad Company, and moves the court to set aside said verdict and grant a new trial on the ground that said verdict awards to the plaintiff excessive damages.

ERWIN & THOMAS,
CARLTON & LUMPKIN,
Def't's Att'ys.

I hereby certify that the recitals in the foregoing motion are true and correct as therein stated, and the plaintiff's counsel is hereby ordered to show cause *instanter* why a new trial should not be granted. It is further ordered —.

Filed in office April 2nd, 1885.

O. C. FULLER, *D. C.*

11 Service acknowledged and copy waived.
April 2nd, 1885.

HOKE SMITH, *Pl'ff's Att'y.*

U. S. Circuit Court.

It is or dered by the court that the verdict in the case of J. C. Dunlap *vs.* The N. E. R. R. Co. be set aside and a new trial granted.

In open court this April 7th, 1885.

ALECK BOARMAN,
U. S. Judge.

Plaintiff amends his declaration and says but for said accident he would have been able as an engineer to make $150.00 per month.

HOKE SMITH, *Pl'ff's Att'y.*

Filed June 23rd, 1885.

A. E. BUCK, *Cl'k.*

J. C. DUNLAP *vs.* THE NORTHEASTERN R. R. Co.

Case in U. S. circuit court N. D. Ga.

It is mutually agreed by the parties to this case that any disqualification that the Hon. Emory Speer, the presiding judge, may be

laboring under of any kind is waived, and we both consent to try the case before him.

June 23rd, 1885.

POPE BARROW, *Att'y — Def't.*
HOKE SMITH, *Pl'ff's Att'y.*

Filed in office June 23rd, 1885.

O. C. FULLER, *Dep't. Cl'k.*

Verdict.

We, the jury, find for the def't.

June 27th, 1885.

C. M. QUILLIAN, *Foreman.*

12 Whereupon it is considered, ordered, and adjudged by the court that the defendant, The Northeastern Railroad Company, do recover from the plaintiff, J. C. Dunlap, the sum — dollars and cents for its costs.

This June 27th, 1885.

BARROW, THOMAS, ERWIN, CARLTON AND LUMPKIN,
Def't's Attorneys.

J. C. DUNLAP *vs.* NORTHEASTERN R. R. Co.

Action for damages in the circuit court of the United States for the northern district of Georgia. Verdict for def't, June 27th, 1885.

In this case the plaintiff moves the court for a rule upon the defendant to show cause why a new trial should not be granted upon the following grounds, to wit:

First. Because the court erred in refusing to charge the jury, as requested in writing by the plaintiff before he began his charge, as follows: "Let the blame, as here used, be understood to mean negligence or the omission of that degree of diligence to which the party is legally bound. Where a railroad employee has been physically injured while on duty he cannot recover of the company if both were to blame, or if he was to blame and the company was not; only where he was not to blame and the company was is he entitled to recover. The blame of a co-employee or of any officer or agent of the company is treated as that of the company itself. After proving the fact of the injury and the degree of the injury, the plaintiff to recover must either show himself not to blame or the company to blame. If he shows that the company is to blame, the presumption of the law would be that the plaintiff was not to blame. If he shows that he was not to blame, the presumption would be that the company was to blame. So that, to make out a *prima facie* case and change the *onus*, he need not go any further than to
13 show by evidence one or two of these propositions—either that he was not to blame or that the company was. By show-

ing either one of these propositions the burden is cast upon the company to show, either from its own evidence or from that of the plaintiff, that the plaintiff was to blame or that the company was free from fault. 58 Ga., 489."

Second. Because the court erred in refusing to charge the jury, as requested in writing by the plaintiff before he began his charge, as follows: "While a corporation is not held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts of the machinery or apparatus which may be provided for the use of employees, its duty in that respect to its employees is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees. 100 Supreme Court Reports, 219."

Third. Because the court erred in refusing to charge the jury, as requested in writing by the plaintiff before he began his charge, as follows: "Under the contract of employment the servant assumes those natural and ordinary risks of his employment which grow out of the same. But the master does not discharge his duty to his employee, except by providing proper and safe machinery in the first instance, and then supervising, examining, testing, and repairing the same as often as custom and experience may require. Thompson on Negligence, 984."

Fourth. Because the court erred in refusing to charge the jury, as requested in writing by the plaintiff before he began his charge, as follows: "It is the duty of the master to keep a sound track for the safety of all persons who are transported over it, and to provide engines and machinery properly adapted to the track. 14 If the master fails to do this and the defect is one which could have been discovered and remedied by skill and foresight, it would be responsible to an employee injured in consequence of such defect, provided the employee was free from fault. Thompson on Negligence. 986 & 987."

Fifth. Because the court erred in refusing to charge the jury, as requested in writing by the plaintiff before he began his charge, as follows: "Common sense, as well as law, makes it the duty of a railroad company to observe all ordinary and reasonable precaution to keep the road in such condition and to equip the road with engines in such a way that its employees engaged in running the trains may safely discharge their duty to the company. If, by the neglect of the company or other employees, the road becomes unsafe or engines and cars are put upon the track too heavy for it safely to bear, the employee who is injured by such neglect, unmixed with fault in himself, may recover. 63 Ga., 181."

Sixth. Because the court erred in refusing to charge the jury, as requested in writing by the plaintiff before he began his charge, as follows: "A railroad company is liable to its engineer whose duty it is to run an engine when he is faultless in his work and, when he has not assumed the consequences of such additional risks, for the casualties and injuries to him caused by the negligence of the

builder of the road or the track-raiser or other employee wholly disconnected from him in his work. 63 Ga., 181."

Seventh. Because the court erred in refusing to charge the jury, as requested in writing by the plaintiff before he began his charge, as follows: "If the rules of the company require a train to run only at a certain speed at a particular place and the train was running at a greater speed than the speed allowed by the company and this speed contributed to cause the accident, then the plaintiff could not recover if the plaintiff's negligence had allowed the additional speed. If, on the other hand, he had used all proper means and no improper means to check the speed of the train; if the steam was shut off the engine and he had required the brakes put on, or if the brakes had been put on without his requirement, and these were all the proper means furnished by the company for the purpose of checking the speed of the train, and an accident, nevertheless, happened, the plaintiff would not be guilty of negligence for failing to check the rate of speed."

Eighth. Because the court erred in refusing to charge the jury, as requested in writing by the plaintiff before he began his charge, as follows: "If a railroad company employs a man to run an engine over its road, when his knowledge of the road is limited, without having been misled or deceived by him as to the extent of his knowledge, then the railroad could only expect and require of the engineer such compliance with its rules as would be possible from one with his experience, exercising all reasonable care and prudence."

Ninth. Because the court erred in instructing the jury: "It was his duty, if he had no air-brakes, as he admitted here, to blow for brakes; if the brakes were not applied and the speed checked, to blow again; and if he saw the speed was not reduced, to reverse the engine."

Tenth. Because the court erred in instructing the jury that "it was his duty to reverse the engine for the purpose of checking speed," the evidence having been that to reverse the engine would have increased the danger.

Eleventh. Because the court erred in instructing the jury that "the plaintiff failed to show that he used any instrumentalities at his command to reduce the speed of the engine as it approached the trestle," and further instructed the jury that "the evidence offered by the plaintiff showed that he made no effort whatever to reduce the speed on account of the trestle," and that for that reason he was not entitled to recovery.

Twelfth. Because the court erred in instructing the jury to return a verdict for the defendant.

Thirteenth. Because the verdict of the jury was contrary to the evidence.

Fourteenth. Because the verdict of the jury was contrary to the law.

HOKE SMITH,
Pl'ff's Att'y.

Filed in office June 30th, 1885.

R. E. BOYD,
Deputy Cl'k.

17 *Charge of Judge Speer to the Jury.*

J. C. DUNLAP *vs.* THE N. E. R. R. CO. OF GA.

Action on the case In the Circuit Court of the United States for the Northern District of Georgia.

This is a suit by an employee of a R. R. company for injuries sustained by the negligence of the company. To maintain this action it must affirmatively appear not only that the defendant company was not at fault, but that the plaintiff was himself properly chargeable with no fault which immediately or remotely, directly or indidirectly, caused the injury or any part of it or contributed to it in any manner by his own negligence.

It being conceded by the testimony of the plaintiff himself and further shows that the plaintiff, the engineer in control of the speed of the train at the moment when the accident occurred, was running the engine and train at the rate of from eighteen to twenty miles an hour within one hundred and fifty feet of a trestle, where the conceded rule of the road commended him to slow up and run at a rate not exceeding twelve miles an hour, this was a violation of
18 his duty; and while running at such rate of speed the engine was thrown from the track and the plaintiff injured. He is not entitled to recover damage for such injury, it being a law of physics, which every one must know and recognize, that the increased rate of speed must necessarily contribute to the risk of accident and thus contribute to the injury. It was the duty of the engineer to use every means at his command to reduce the speed of the train at a safe and sufficient distance from the trestle to enable the train to slow up and to run across the trestle at a rate of speed not exceeding twelve miles an hour. It was his duty, if he had no air-brakes, as is admitted here, to blow for brakes, and if the brakes were not applied and the speed checked, to blow again and to blow danger signals; and if he saw the speed did not reduce, to reverse the engine, and if necessary to reduce the speed, to come to a stand-still. It is not compellent — permisable for an engineer, with the power of his engine at his command, to allow a train laden with passengers to run down a long and steep grade to a trestle at a rate of speed largely in excess of the rate fixed by the rule of the — plaintiff having failed to show (and the facts offered
19 by the plaintiff showing otherwise) that he used any instrumentality at his command to reduce the speed of the engine as it approached the trestle, and the evidence offered by him show-

ing that he made no effort whatever to reduce the speed on account of the trestle, the plaintiff is not entitled to recover.

In the courts of the United States when the testimony is if such a conclusive character as to compel the court, in the exercise of a sound, legal discretion, to set aside a verdict in accordance with the evidence—and the evidence of the plaintiff's contributory negligence in this — being, in the opinion of the court, of this conclusive character—the jury is instructed to return a verdict for the defendant.

HOK- & BURTON SMITH,
For the Plaintiff.

POPE BARROW,
H. H. CARLTON,
ALEX. S. ERWIN,
E. K. LUMPKIN, &
G. D. THOMAS,
For the Defense.

Note by the presiding judge.—The grounds set forth in the motion for new trial are correct, except that the ninth, tenth, — eleventh grounds stated in the motion in the isolated & disjointed form
20 in which they are there presented do not convey clearly the meaning of the court. This will accurately appear by the charge in full hereon written and by the court made a part of the motion, with this correction, the rule *nisi* is granted & the defendant is required to show cause before me on Wednesday next, the 8th inst., why the verdict should not be set aside and the new trial allowed. Ordered further, That the defendant or its counsel be served forthwith with a copy of the motion & this rule, and that the brief of evidence be presented to the court for approval as required by law.

EMORY SPEER,
U. S. Judge.

I acknowledge service of the foregoing *within* for a new trial and order of the judge and have a copy.
July 3d, 1885.

POPE BARROW,
Def't's Att'y.

Upon hearing argument upon the within motion on new trial it is ordered and adjudged by the court that the motion be disallowed and the new trial refused.
July 8th, 1885.

EMORY SPEER,
U. S. Judge.

21 Bill of exceptions In the case of J. C. Dunlap against The Northeastern Railroad Company, in the circuit court of the United States for the northern district of Georgia.

Be it remembered that the above-stated case came on to be tried

before his honor, Emory Speer, judge of the district court of the United States for the southern district of Georgia, presiding under the special order in the northern district of Georgia, and before a jury empannelled to try said case, on the 23rd day of June, in the year 1885.

The plaintiff introduced the following evidence:

J. C. DUNLAP was introduced by the plaintiff, who swore:

I am the plaintiff in this case. I was employed in 1882 by the Richmond & Danville railroad. I had been there about a year. I was a locomotive engineer. During the month of August, 1882, I was sent to relieve a man on the Northeastern railroad. I did not report to any one — particular on the Northeastern road. I went there by the order of Mr. Ward, the master mechanic of the air-line road. I relieved him on Saturday. I hauled dirt on Saturday. Saturday evening I went to Tallulah Falls and got Mr. Johnson, the conductor, and went from there to Athens Sunday evening. I had never been over the road before. I had no experience over it or knowledge of the track. On Monday I taken the train from Athens under the order of Captain Barnard, superintendent of the road. I think there were ten cars in the train. I taken it from Athens to Tallulah Falls. Mr. Davis was my fireman. Mr. Barnard sent another man on the train to show where the water-tanks and wood-yards were. I left Tallulah at about seven o'clock. I reached Clarkesville a few minutes after eight. This side of Clarkesville, between two and one-half and three miles, it was, I think, the engine ran off the track.
22 I was in my box on the engine at the time the engine turned over. When the engine ran off the track I tried to reverse the engine, and did reverse the engine. I think I was running between eighteen and twenty miles an hour at the time of the accident. I have been an engineer for thirteen years, and railroading for sixteen years. I have not lost more than a week or ten days, or something like that, in thirteen years. The accident was about two miles from the top of the grade. I think the brakes were on—some of them, at least—just after the engine came over the hill and started down grade. I could feel them jerk my engine and pull back at that time. I could see about one hundred yards, I reckon; on the straight track, twenty or thirty yards. I have never seen or read the train rules governing the running of trains on the road. It was impossible for me to remember just where the trestles were at night, having gone over the road so little. I did not know the trestle was immediately in front of me. I do not know anything, knowing as little about the track as I did, which I could have done to have prevented the accident. My health was bad after the accident. I could not use myself at all; I could not use myself at all for some time afterwards; it was two or three hours before I could move at all. The first thing I moved was my hand. My pain was in my back, and I was bruised all over. I was lying under the second or third car from the engine. There had not been anybody to me at that time. It was probably two weeks before I could use my left hand and lift it; it was three weeks before I could move my feet; it was

six or seven weeks before I could use crutches. I improved gradually for about twelve months, and then ceased to improve. The injuries which I received in my back caused me constant pain and suffering. I am now engaged in running a shifting engine on the Memphis and Little Rock railroad — an arrangement which
23 allows my fireman to relieve me constantly. I am only able, on account of injuries which I received, to work about one-half of my time. I make about five hundred dollars a year. My age is thirty-four years. I had charge of engine No. 29 of the air-line railroad. I had run the engine on several times, I suppose. I was accustomed to it. I was acquainted with it. I went under Mr. Wall's order to report to some one. I was only in the employ of the Northeastern road on that occasion. I was sent up there by Mr. Wall. I made no contract after I got there. I was under Mr. Wall's orders in going there. I do not know whether Mr. Wall had anything to do with the Northeastern railroad. I took an air-line engine, No. 29. Turnersville is beyond the place of the accident. It is four miles from Tallulah Falls. That was the first time I ever went over the place. When I went up to take the engine I passed over the place. I staid there and hauled dirt, cleaning out some cuts. On Saturday I ran over that place.

Q. Did you run over that place?

A. Yes, sir; I brought the engine down to Rabun Gap on Sunday. I came over this place on Sunday. The accident was on Monday. I went back over it on Monday. I had gone over the place of the accident three times before the accident, twice running this same engine. I knew there was a trestle somewhere there. I did not know how far I was from it, or anything about it. I did not know it was at the foot of the grade, nor how near it was to the foot of the grade. I did not know the trestle was two miles from Clarkesville. The trestle was about two miles from the top. I think the grade was about two miles long to the place of the accident. I have since seen the place of the accident.

Q. How far was the accident from the trestle?

A. I have only seen the place since.

Q. State as best you can.

A. One hundred feet from the trestle. I do not know whether the trestle was at the bottom of the grade. It is some-
24 where near it. The railroad comes uphill after you cross the creek. I do not know that the trestle is at the bottom of the grade, but it is somewhere near it. I have been told that the cut was two miles long. I have been over the track since. I was in one of the coaches when I went over the place on Saturday evening. I went down to Athens Sunday evening and got there about nine o'clock at night. I saw Mr. Barnard the first time about six o'clock the next morning. I do not know all of the conversation with Mr. Barnard. I was speaking about the engine—about the conductor and brakeman. I do not remember about his saying anything about speed; I do not think he did. I had a schedule. I suppose the pamphlet containing the schedule had the running rules at the back of it. I had a schedule, but I never looked to see. I do not

know. I do not remember whether it had the running rules at the back. Very nearly all of them have the rules. I did not drink any whiskey that day. I drank a half glass of beer about two o'clock; that is all I drank. I did not blow for brakes after leaving Clarkesville. If I blew for brakes, I do not remember it. I am almost certain I did not blow for brakes. I do not know what the grade was. I let the train go from the top to the bottom without blowing for brakes. It was two miles. I do not think I could have seen the trestle from where I was. I do not think I could have seen it that night. I did not do anything towards stopping or checking the speed until I saw the engine was off the track. My fireman had been putting in wood and had just got through. I was working no steam. I shut off the steam at the top of the hill. After the train left the track I tried to reverse. That was my first attempt to stop the train and my only attempt. I had been going down grade two miles. I was off duty fifteen days, I reckon, at one time while in the employ of the Richmond and Danville road. I think it was for running over a bridge where they were at work at it, near Greenville. The charge was running too fast.

Q. After you were hurt how long were your wages paid by the Northeastern road?

A. For thirteen months. I think they paid me $3.90 a day for the time I was hurt up to Feb'y; then they paid me $100.00 a month. I was able to do no work while I was getting this money.

Q. They just continued your wages?

A. Yes, sir; Col. Foreacre continued to pay me until the time they took the road away from him.

Q. What were you doing?

A. I was looking forward; it was my duty as an engineer to do so. I did not tell Mr. Spencer or Mr. Mullinax that I was running pretty fast, and did not see the trestle until I got right on it, and reversed the engine and was off before I knew it. I knew the rules of the Richmond and Danville Railroad Company. I do not think I was excited at the time of the accident. I had run by the junction frequently and shifted cars backwards and forwards on it. There was a side track put in there and I had frequently shifted cars upon the side track of the Northeastern road. My attention was not called to the rules of the Northeastern road by any one. The schedule was in the engine when I went in there. No one told me to examine the rules. It would have been impossible for me to have examined the rules and to have run by them or to have run by the regular set of rules, having gone over the road but twice and having no opportunity to study them, except that casual opportunity upon the train. I would not have known about the trestles. I did not know where they were.

H. C. TROTTER was next introduced by the plaintiff by deposition, who swore:

I was engaged as section master during the summer of 1882 on the Northeastern railroad. I made an examination of the place of the accident. The condition of the track before the accident

26 was dangerous because the embankment on the outside of the track at that place was too weak. The rails were too light for the engine. The road-bed had been made up some six years and had washed away, except about five feet on top. It had been repaired with new dirt to the length of the ties. At the time of the wreck the outside rail had only an elevation of about one and one-half inches. This elevation was not sufficient, owing to the sharpness of the curve and the weight of the engine. I would have made the elevation higher, but I did not have the dirt. The heavy engine coming against the tangent of the curve, the rail being too light, broke about a foot from the joint and let the engine off the track. They had been running from Jan'y to Aug. Trains had been passing over it daily up to that time. Anything over thirty-five miles an hour would have been unsafe. Its condition made it unsafe for a heavy engine at any speed.

Dr. J. J. KNOTT was next introduced by the plaintiff, who swore:

The injuries of the plaintiff are serious and permanent, rendering him unfit for any active service.

The plaintiff here closed.

27 *Evidence for the Defendant.*

W. M. BONE was introduced by the defendant, who swore:

I was a passenger on the excursion train. I saw Dunlap, and went with him from the engine to Tallulah Falls. He was the engineer. Davis, Peeler, Dunlap, and myself went into the bar-room, and we four treated a drink around. We each took four drinks; they were of beer. I saw him with the engine a short time before the train left, in the woods. He seemed to feel good, jolly, and as rich as anybody. His breath smelt of whiskey. He ran to Clarkesville sometimes slow and sometimes fast; by fits and starts. It was dark as he pulled out at Clarkesville. I got off there. From the sound of the wheels I judged that he pulled out faster than usual. I know the place of the accident. The banks seem to be as wide as any place on the road. It was between seven and nine feet wide. The cross-ties were eight feet long. The outer rail, I reckon, was three or four inches higher than the inner rail. It was higher. Bank was broader than the cross-ties. The ties were new and the bed firm. I am now doing nothing. I have been driving stock, and in the livery-stable business. I have never before been a witness in a case growing out of this accident; have walked once from Clarkesville to Rabun Gap—only once. It was a very sharp curve. I had watched it while on the train. My opinion of the elevation of the outside rail was formed from riding over it on the train. I sat in the back of the train. I stood in the baggage car and looked out sometimes. I looked forward, and sometimes back. It ran slow around there; never railroaded any in my life. I knew the necessity of the outside elevation from hearing people talk. I form my opinion from looking out from the baggage car, and my walking over it three or four times. I had ridden over it three or

four times in the baggage car. I knew Trotter; he was the
28 section master at that place. From his character for truth and veracity I would not believe him on his oath. I never was in the employ of the road.

J. H. GRIGGS was next introduced by the defendant, who swore:

I was acquainted with H. G. Trotter. From my knowledge of his general character for truth and veracity I would not believe him on his oath.

PORTER WIMBY was next introduced by the defendant, who swore:

I was assistant barkeeper at Tallulah Falls when the Pioneer excursion came up, in Aug., 1882, the time of the accident near Clarkesville. I furnished the engineer, Dunlap, five or six drinks of whiskey during that day. I also saw him the first time that he came with several parties. I did not wait on him at that time. They took something near the beer department, but I cannot state what. I had never seen him before that day, but, thinking he might come there regularly and become a good customer, I was particularly attentive to him.

J. G. ELROD was next introduced by the defendant, who swore:

I saw the engineer at the Clarkesville depot the morning that the Pioneer excursion went to Tallulah Falls. The engine stopped and turned upon the turn-table at Clarkesville. Just as the engine got in I saw him stoop down and take out a tin cup and pour something from a pint whiskey bottle into the cup and drink it. I know it was Dunlap because I had seen him run the engine several times before past Clarkesville; it might have been a month or two months or three months before.

D. D. QUILLIAN was next introduced by the defendant, who swore:

I was a passenger on excursion train. I saw Dunlap drink something, but I could not say what it was; it looked like whiskey. It was in the afternoon, at Tallulah Falls, in the bar-room, the
29 day of the Pioneer excursion *the Pioneer excursion.*

(By plaintiff's counsel:)

Q. Did you see Davis, a large man, about six feet high and weighing about two hundred pounds, at the time you saw Dunlap?
A. I do not remember seeing any such man.

W. D. TAYLOR was next introduced by the defendant, who swore:

I saw Dunlap during the afternoon of the day of the Pioneer excursion; he was in the bar-room. I saw him drink something; it was not from a beer or cidar glass; it looked like brandy or whiskey. I never saw Dunlap before. There were a number of persons in the bar-room at the time; the house was full. It was about the middle of the day. I had seen Dunlap before on the air-line road. He drank out of a small glass. W. M. Jones was not one of the party. I never testified in a case growing out of this accident before. I

never had any connection with the railroad. I did not see Davis or Peeler in there. There were two or three with Dunlap, but I do not know any of Dunlap's party, as I remember.

J. B. ELROD was next introduced by the defendant, who swore:

I have never been in the employ of the railroad. I was at the depot when the excursion train passed through towards Tallulah Falls. Just before it pulled out there were several persons got on the tender of the engine. I was one of them. The engineer asked what in the hell we were doing there. One of the boys pulled out a bottle of corn whiskey, and the engineer and all of us took a drink. I had seen the engineer before, once or twice, as he run an engine from Rabun Gap to Tallulah Falls. I was never a witness in a case growing out of this accident before.

B. F. CULP was next intrduced by the defendant, who swore:

A short while after we reached Tallulah Falls, the day of the excursion, I saw Dunlap take a glass of something at the bar-room. I was a passenger on the train at the time of the accident. I thought we were running faster than at any time that day. I could not say how fast. I thought we were running, perhaps, thirty miles an hour. I have never had any experience in railroading.

Dr. L. G. HARDEMAN was next introduced by the defendant, who swore:

I was a passenger on the excursion train. I have travelled as a passenger a good deal; never have been a railroad man. I thought we were running considerable faster than before during the day. I think we were running from thirty to forty miles an hour. I saw Dunlap after he was hurt. He was almost insensible when I reached him. I could smell liquor on him. I helped carry him to Spencer's house, and I smelt liquor upon his breath. When I first saw him he was lying upon the railroad track.

R. C. WILLHITE was next introduced by the defendant, who swore:

I am a wool-carder. I have never ridden on but two railroads. I was upon the train at the time of the accident. I thought they were running very fast, from the motion and noise. It was very difficult to stand up. I thought they were running from thirty to forty miles an hour. I was on the platform and thought it was dangerous to stay there, so I went in, and I fell against the stove once or twice and against some ladies.

M. D. BROWNING was next introduced by the defendant, who swore:

I was a passenger at the time of the accident. I formed my opinion from the motion of the cars, as to the speed. I was on the platform and went in to look after my nephew. I could scarcely stand up. I thought it ran from Clarkesville to the place of the accident

from thirty to forty miles an hour. I am not a railroad man, and have never ridden much on trains; am deputy sheriff of Clarke county.

W. A. JESTER was next introduced by the defendant, who swore:

31 I am in the restaurant business. I had refreshments upon the excursion train. I thought it ran faster all the way back from Tallulah Falls. It was about dark at the time of the accident, and, judging from seeing objects, but particularly from jostling, I thought it was running at the time of the accident from thirty to forty miles an hour. I think it ran from Tallulah to Clarkesville at from twenty-five to thirty miles an hour. A sharp curve and a rough road would have been calculated to mislead the estimate of a passenger as to speed. I have never been a railroad man. It was twelve miles from the Falls to Clarkesville.

A. G. ELDER was next introduced by the defendant, who swore:

I was a passenger at the time of the accident. We went down grade much faster than we went up. I was standing between the fifth and sixth coach. The motion caused me to lose my balance, and I went into the sixth coach. It did not run off the track. I judged of the speed by the jostling and by observing passing objects. It was much faster than at any other time after leaving Clarkesville. I was on the platform awhile—about five or ten minutes—about ten minutes, I reckon—and then I was in the car before the accident about ten minutes; I cannot be exact as to time.

DAVID GANN was next introduced by the defendant, who swore:

I was a passenger at the time of the accident. I am a farmer at present; have been a livery-stable keeper for thirty years; run "bus" and met trains. The speed was faster than I had ever run on that road. I was sitting at a window. I formed my opinion from the jostling and motion and from observing objects. I do not know what the speed was. It was probably thirty-five, forty, or fifty miles an hour. I do not know anything about rails and tracks; have never railroaded. I examined the place after the accident, and my opinion is that fast running caused the accident.

GEO. M. BOOTH was next introduced by the defendant, who swore:

32 I was a passenger at the time of the accident. From the waving and the running of the train I think it was running about forty miles an hour: never rode much on railroads—only on two other roads. My business is selling meat.

J. A. NICHOLS was next introduced by the defendant, who swore:

I was a passenger at the time of the accident. From the rocking, jostling, and jerking I think the speed was from twenty-five to thirty miles an hour. Four coaches were all that left the track. The engine stopped in fifty or sixty feet from where it left the track. I did not measure it or notice it particularly.

R. S. CHANEY was next introduced by the defendant, who swore:

I was a passenger at the time of the accident. The train was running thirty-five miles an hour. It was on an embankment. The speed was much greater than at any time that day and than the usual speed of the road. I was timing train from Clarkesville to Rabun Gap Junction. I had my watch in my hand, and from Clarkesville to the place of the accident it was four minutes. I was timing it because there was a dispute about the speed by some parties and I was requested to time it. The parties differed, and I was to time it from Clarkesville to Rabun Gap Junction. The train must have run one hundred and fifty feet after it left the track. I was a railroad man, and, the conductor not being able to do anything, it was my duty to attend to things. I was employed on the road when the track was laid, and have been employed by the road ever since the accident. I am familiar with the road. Although there have been two trials growing out of this accident prior to this, I never told any one what I knew. I never before was a witness. I never communicated what I knew to my superior officers until last week. I was talking to several young ladies and men after we left Clarkesville. I was to time it. I think my wife and Mrs. Landrum saw me timing. I did not anticipate any trouble. I knew everybody in the car. They were discussing it among themselves; think Mrs. McLoughlin, wife, and Mrs. Landrum saw it. Mrs. Landrum was sitting across the aisle. My wife was in the seat in front of me. I knew speed caused the accident, and I said nothing to my superior officers about it. I do not remember who I was talking to about the speed. Mr. Quillian was present, but do not remember that he was in the discussion. I did not think about the fact that speed was material at the time. I do not remember the name of a single man who saw me time the train. I did not swear that I began to look after things. I did not tell superior officers what caused the accident because there was no order for me to do so, and it was not my duty. There were two shocks. I had my head out of the window, and when the first shock came I took it in and looked at my watch, and said, "it has been four minutes." I did not anticipate any trouble. I put my head back out the window again and the second shock came, and my watch fell out of my hand into my wife's lap. I talked about this to several parties; never informed Barnard or railroad officials; took no note of men who were there. I could get them up; held watch in hand; wife was talking to parties; commenced timing at Clarkesville; look at it three or four times; it was two and one-eighth miles from Clarkesville to place of accident. Mr. Thomas wrote to me last week about it.

33

PRIESTLY HOWARD, WYLY JONES, SAM. KINSEY, and H. D. WILLIAMS were next introduced by the defendant, who swore:

We are farmers. We live from two hundred yards to a mile of the track of the Northeastern, where the accident occurred. We heard the train the night of the accident. Our attention was called to the fact, from the noise which it made, that is was running con-

siderably faster than usual. We are acquainted with the gen-
34 eral character of H. G. Trotter, and from it we would not be-
lieve him on his oath. Howard saw the train just before accident.

W. M. NIX was next introduced by the defendant, who swore:

I am right smart acquainted with the road at the place of the accident; have passed over it once or twice. The fill was two or three feet wider than the cross-ties. The outside was elevated from two to three inches.

R. W. WEST was next introduced by the defendant, who swore:

From his general character for truth and veracity, I would not believe him on his oath. Trotter's reputation was well established, and was easy to find out at the time when he was section master. It was not good for sobriety; not very good for industry. He was a sort of a drunken vagabond.

WILLIAM MULLINAX was next introduced by the defendant, who swore:

The rail had a twisted appearance at the break. The last day we had work we had worked over that place, and the day of the excursion we were working some two hundred yards above it. I was one of the section hands under Trotter, but I depended at that time on the rules of the elevation, &c., for the track. The track, rails, and cross-ties were all right and in good condition the day before, when we worked over it, so far as I know. The outer rail was three or four inches higher than the inner rail. I do not think the elevation has been increased since, except in shaping up the track.
35 I am acquainted with the general character of H. G. Trotter, and would not believe him on his oath. Made measurements last week of place of accident; distance same as Spencer. Engine ran one hundred and ninety-two feet after leaving track.

D. J. O'CALLAGHAN was next introduced by the defendant, who swore:

I live about a mile from the place of the accident. I heard the train on the night of the accident. I noticed the sound and it attracted my attention. The embankment at the place of the accident was ten feet wide; the elevation of the outside rail about two or three inches. It is almost impossible without measurement to get within one or two inches of the difference between the elevation of the two rails. I knew the place very well, for I had fished about there. I am not a railroad man. The engine ran from twenty to thirty feet beyond the end of the trestle.

W. W. FOREACRE was next introduced by the defendant, who swore:

I was roadmaster on the Northeastern road at the time of the accident. The fill was from one to two feet wider than the cross-ties. The rails were forty-five-pound rails. There should be three-

fourths of an inch elevation to the degree between the outside and the inside rails on a curve. At this place, by measurement several months before the accident, the outside rail had that elevation. I had been over the road every two or three days between the time of the measurement and the time of the accident, and I considered the road-bed at that place in good shape. Trotter should have reported it to me if it was defective, and he never did so. From his general reputation I would not believe Trotter on his oath. His reputation came to my knowledge after the accident.

WM. BERRY was next introduced by the defendant, who swore:

Have been on road a long time; am now express agent; was familiar with point of accident; elevation of outer rail was two to three inches; bank was about two feet broader than ties; ties
36 were good.

H. H. HALE was next introduced by the defendant, who swore:

I was the conductor on the Pioneer excursion train. The train left Tallulah Falls at seven o'clock and reached Clarkesville a little after eight. I went through the train after leaving Clarkesville and reached the last coach, and had set down and was eating when the accident happened. The train was running, at the time of the accident, between eighteen and twenty miles an hour. As the train was going up from Athens to Tallulah I had occasion to compare with Mr. Dunlap the schedule of the train which we were following. He had the Northeastern schedule in his hand and also a black book which looked like the rules of the Richmond & Danville road. My attention at the time of the accident was not particularly given to the speed of the train. At the time of the accident I was talking to some ladies, and eating.

R. H. BARNARD was next introduced by the defendant, who swore:

I am superintendent of the Northeastern road. I was superintendent of it during Aug., 1882. I identify the rule book shown me as the rules of the Richmond & Danville railroad. They were the same rules which were in force on Aug. 7th, 1882, and they were adopted by our road. I also identify the schedule of the Northeastern railroad in force in 1882, at the back of which appear the general train rules of the Northeastern road. Those rules were in force in Aug., 1882, and went into effect Feb'y 27th, 1882. If Mr. Dunlap had the schedule of the Northeastern road in Aug., 1882, in the back of the pamphlet containing the schedule were also those rules. I also identify the schedule of the Richmond & Danville road and the rules in the back of the pamphlet containing the schedule. The dates of the rules of the Richmond & Danville railroad are Feb'y 26th, 1882. Whether they were abridged or added to in any way I cannot say. The rule prohibiting the use of intoxicating liquors
37 by engineers and others while on duty was always in force. I think the rule with regard to reducing the speed of passenger trains to twelve miles an hour before crossing bridges and trestles was in force at that time. Mr. Dunlap entered the employment of

the Northeastern road probably on Friday. The excursion train started from Athens on Monday. He took charge of the engine at Turnersville. Turnersville is about four miles from Tallulah Falls. Clarkesville is about twelve miles from Tallulah Falls. The first instructions which I gave Dunlap were to bring the engine to Athens on Sunday evening and be ready to go out Monday morning thirty minutes after the regular train. Monday morning, just before he left Athens, I talked with him about the train and the track and the conductor and the equipment of the train, and about the pilot and the pilot's duty, and about the character of the conductor and the character of the run generally, and the rate of speed, which was from eighteen to twenty miles an hour—not to exceed twenty. He was to start thirty minutes behind the regular train. The regular-train schedule, I think, was twenty miles an hour — he had in that schedule, and knowing the stations as he came to them could keep thirty minutes behind. We paid Mr. Dunlap his wages for several months after he was hurt, and until in Sept., 1883, when our road went into the hands of a receiver. Mr. Dunlap was sent on our road by an arrangement made by the president. I received notice from Col. Foreacre, the president of the Northeastern road, that he would send a man to take the place of another engineer. I got the understanding from Mr. Foreacre that Dunlap was a regular engineer upon the Richmond & Danville road. I got the understanding that he was a good man. I never knew Mr. Dunlap before he came to work for us. I explained to him that he had a safe conductor. I understood that he had never been over the road
38 but once. I told him that he had a good set of brakemen. Mr. Hale was the conductor. I told Mr. Dunlap he could rely upon him. I got to the wreck next morning at eleven o'clock. From my experience as a railroad man, based upon the presentation of the wreck when I got to it, the train could not have been running over eighteen miles an hour. I think there were seven or probably eight cars to the train after the accident; continued Mr. Dunlap on full pay. I do not know that Mr. Dunlap ever saw our train rules or read them. I do not know what changes might have been made in this rule, but this rule about speed was in force in Aug., 1882. Their maximum-speed rule was in force at that time. I told him not to run over eighteen or twenty miles an hour. I did not say anything to him about bridges or trestles—not a word.

T. D. SPENCER was next introduced by the defendant, who swore:

I live in Habersham. I remember the accident on the Northeastern road. Mr. Dunlap was taken to my house after the accident. He staid about a month. I was not at home at the time of the accident. I came home in about two weeks, but did not stay. I had a conversation with Mr. Dunlap when I came home. It was after he got so he could get up and we were sitting on the piazza. I asked him one day what was the cause of it. He said he did not know as he knew. He said, "I was running pretty fast and was unacquainted with the road. I saw the trestle and blowed my brakes and reversed my engine and was off so quick I did not know what it

was." The length of the trestle was three hundred and fifty feet; trestle is fifty-five feet high. An engineer sitting on his engine can see it five hundred and thirty-three, standing on track can see it four hundred to five hundred, feet. From the character of H. G. Trotter I would not believe him on his oath. I made the measurements about a week ago. I did not stand on an engine to see before I made them. I made them in
39 the daytime. I do not know how it would be about seeing in the night. I did not look in the night. I am talking about seeing in the daytime. An engineer occupies the right-hand side of his engine. He has to depend at night upon his head-light, and that throws the light straight ahead. The curve at the place is sharp. I do not know whether a straight line one hundred feet before you reach the trestle would cut the trestle off from sight. I do not know whether it would or not. I think the head-light on an eight-degree curve one hundred feet from the trestle would fall on the trestle. The curve gives out a little before it gets to the trestle. I have not measured it. A straight line would throw you considerably off the track in a hundred feet. I do not know whether an engineer at night could have seen the trestle. Off to the right, coming from Clarkesville, it is tolerably level for a piece. It gets steeper as it goes on towards the creek. The head-light, going around the curve, would strike the side of the hill. It is cleared up as far as the right of way goes, and then there are trees.

J. C. TURNER was next introduced by the defendant, who swore:

I was chief engineer of the Northeastern road during the construction of the Northeastern road. I was chief engineer of it in 1882. I am still chief engineer of the road. I get no pay or salary. I have never been discharged. The embankment at the place of the accident was wider than the ties. The ties were eight feet long. They were first-class ties. I do not say that all of them were; I think they were; but the majority of them were good ties. The bearing was two feet from centre to centre. I cannot give the exact elevation of the outside rail. The embankment was built in 1874. It was old work, dressed up by the contractors where it was necessary. There was no material added at that point. The quality of the dirt is fine. It packs very hard and makes a fine em-
40 bankment. There was nothing done with the embankment. It was twelve feet wide. I suppose the rain had washed off a little of it, but it was still wide enough. Where the accident happened, it was an eight-degree curve. It is proper in railroading to elevate the rail on the outside on curves to counteract the centrifugal force of a moving engine. On curves this elevation is found by considering the radius of curvature, the speed that the train is to run, and the gauge of the road. I have not figured out what the proper elevation should be to run twenty miles an hour. The general rule is to elevate about one-half of an inch to the degree. Henke, a high authority in railroad matters, gives the proper elevation worked out for curves of different degrees. By Henke's rule the elevation for speed of fifteen miles an hour on an eight-degree

curve would be a little over an inch; twenty miles, two inches. On an eight-degree curve, at twenty miles an hour, two inches would be a safe elevation. We usually elevate, however, for a speed of thirty miles an hour about one-half inch to the degree up to five or six degrees; and then stop to reverse an engine on an eight-degree curve, I think, would cause a greater strain upon the track on the outside rail. Reversing the engine would suddenly stop or check it, and it would come like a "pile-driver" against the outside rail, and the inclination would be to drive it off of the tangent. I do not know exactly what would be a proper-weight engine to run at eighteen or twenty miles an hour on a forty-five pound rail. I will state that we use thirty-ton engines in this country on rails that weigh less. We use much heavier engines on very little heavier iron. On fifty-pound rails we use thirty to forty ton engines, and on some roads lighter rails are used. The faster you run the greater the strain on the outer rail on a curve. The great strain under these conditions would be under the outer driving wheels.

41 The iron on the Northeastern, at Rabun Gap, where it joins the air line, is the same weight as at this point—forty-five pounds. Where the ties are two feet from centre to centre, a lighter rail can be used than where the ties are three feet from centre to centre. Rankin's formula is based on the ties being three feet from centre to centre. I have never known a guard rail to be placed on a curve, except on trestles, on any of the roads. The rails at this point were double spiked—that is, two spikes in each tie at each end, and at joints there are four. The curve from the point of the accident back toward Clarkesville was from one thousand to twelve hundred feet in length. The grade is two miles long at that point. I have not been actively engaged in engineering for two years. All the actual laying of railroad track that I have done for the past ten years was sixty-one miles on the Northeastern road. The general practice is to elevate the outside rail not less than one-half inch to the degree. The eight-degree curve would not have been necessary at this place, but it was made to save some work which had been done laying the track before I got to it engineering. It is not best to put curves on steep grades. In this case the curve was not owing to the shape of the grade—it was principally to save some heavy work we had already done. The regular weight of the engines used on the Northeastern road, I think, is about twenty-two tons or twenty-eight, I forget which. The engine used on this occasion was considerably larger. An eight-degree curve is not unusual. There are very much sharper curves on roads. The air line has ten-degree curves. The Baltimore & Ohio and the Western North Carolina have ten and eleven and some twelve degree curves. They are sharper than eight. I mention those because they are fine, first-class roads.

H. B. BAYLOR was next introduced by the defendant, who swore:

42 I am an experienced railroad civil engineer. Elevation of outer rail on curves is based on the sharpness of the curve and the speed at which you wish to run. On an eight-degree curve,

speed of twenty miles per hour, proper elevation of outer rail is two and three-fourths inches—is the rule by the books, but it is a little under my own experience. For a thirty-four-ton engine, where the ties are two feet from centre to centre, a forty-five-pound rail is safe for a speed of twenty miles per hour. At a high speed it would probably require a heavier rail. Where the ties are two feet from centre to centre a lighter rail can be used with safety than where there are three. Rankin's formula is calculated for three. It is an old work. The railroad iron of the present day is much better than of that day. An eight-degree curve is not unusual. The Baltimore & Ohio has many sharper curves—one seventeen-degree curve. Rankin's formula requires a ninety-pound rail for a thirty-four-ton engine. Railroad iron can be made now better than years ago; but when it is made with but a small proportion of pig-iron, as was the custom at the Atlanta Rolling Mills, it is far inferior to the iron formerly made. I can show no authority which will allow a thirty-four-ton engine to run on a forty-five-pound rail.

The defendant next introduced the following rules, heretofore identified:

Rules Attached to the Richmond & Danville R. R. Time Table.

3. No excuse will be taken for being ahead of schedule time. Engineers and conductors are alike responsible.

8. The use of intoxicating liquors while on duty by conductor and enginemen or others engaged upon the trains, violations of rules, and neglect of duty will subject the offender to certain dismissal.

43 Report promptly by telegraph all delays, accidents, &c.

In all cases of doubt take the safe side and run no risks.

The speed of passenger trains must be reduced to twelve (12) miles and that of freight trains to ten (10) miles per hour before crossing all bridges and trestles, and all trains will reduce their speed to six (6) miles per hour at such bridges and trestles as may be under the cover of caution signals. In cases of violation of this rule the statement of watchman and bridge foreman as to speed run will be the deciding evidence.

Rules Attached to the Northeastern R. R. Time Table.

Northeastern Railroad of Georgia—H. R. Bernard, Sup't. Time Table No. 4.

Takes effect Monday, Feb. 27, 1882, at 5.55 o'clock a. m. Destroy all previous time cards. For government and information of employees and not for information of the public. The company reserves the right to vary therefrom, when necessary, without notice.

#6, M'ch, 1882.
#7, April, "
#8, June, "
#9, July, "
#10, Nov., "

Distance Table.

Northeastern Railroad of Ga.

From Athens.	Between stations.	Stations.	Between stations.	From Clarkesville.
		Athens	7	60
7	7	Center	5	52
12	5	Nicholson	7	48
19	7	Harmony Grove	7	41
26	7	Maysville	6	40
32	6	Gillsville	8	32
40	8	Lula	1	26
41	1	Bellton	7	19
48	7	Longview	4	12
52	4	Rabun Gap Junction	8	7
60	8	Clarkesville		

No. 53, Going North.

Miles bet. stations.	Stations.	Time of arrival.	Time of dep'ture.	Remarks.
	Athens	A. M.	5 55	
7	Center	6 14	6 15	
5	Nicholson	6 34	6 35	
7	Harmony Gr.	6 56	7 01	
7	Maysville	7 22	7 23	
6	Gillsville	7 48	7 49	
8	Lula	8 10	8 20	
1	Belton	8 24	8 24	
7	Longview	8 50	8 50	
4	Rabun Gap	9 04	9 14	Meet No. 50, N.E.R. Meet No. 50, R&D.R.
8	Clarkesville	9 44	A. M.	

No. 50, *Going South.*

Miles bet. stations.	Stations.	Time of arrival.	Time of dep'ture.	Remarks.
			A. M.	
	Clarkesville	A. M.	8 42	
8	Rabun Gap	9 12	9 15	Meet No. 53, N.E.R.
4	Longview	9 30	9 30	
7	Bellton	9 56	9 56	
1	Lula	10 00	10 31	
8	Gillsville	10 56	10 58	
6	Maysville	11 23	11 25	
7	Harmony Gr.	11 46	11 51	
		P. M.	P. M.	
7	Nicholson	12 11	12 13	
5	Center	12 28	12 29	
7	Athens	12 51		

No. 1, *Going North.*

Miles bet. stations.	Stations.	Time of arrival.	Time of dep'ture.	Remarks.
	Athens	P. M.	2 45	
7	Center	3 05	3 07	
5	Nicholson	3 25	3 28	
7	Harmony Gr.	3 50	3 55	
7	Maysville	4 18	4 23	
6	Gillsville	4 41	4 45	
8	Lula	5 15	P. M.	Supper.

No. 2, Going South.

Miles bet. stations.	Stations.	Time of arrival.	Time of dep'ture.	Remarks.
	Lula	P. M.	5 45	
8	Gillsville	6 10	6 11	
6	Maysville	6 30	6 31	
7	Harmony Gr.	6 51	6 56	
7	Nicholson	7 16	7 17	
5	Center	7 32	7 33	
7	Athens	7 55	P. M.	

Train Rules.

Trains daily Sundays excepted. Train No. 2 will wait 30 minutes at Lula for delayed passenger trains on R. & D. R. R. Approach and leave all stations carefully. Reduce speed to 10 miles per hour before crossing all bridges and trestles, and keep damper closed while passing all cotton platforms, depots, and bridges.

Start promptly, run steadily. No excuse will be taken for being ahead of schedule time. Engineers and conductors are alike responsible.

The use of intoxicating liquors by employees will subject the offender to certain dismissal.

Delays and accidents must be reported to superintendent by conductors and engineers as promptly as the nature of the case will admit.

The rules and regulations of the transportation and roadway departments of the R. & D. R. R. Co. are hereby adopted for the government of employees of the N. E. R. R, all other rules being withdrawn. The N. E. R. trains will be run by the Atlanta & Charlotte air-line railway time. The conductors of the N. E. R. R. will, whenever opportunity offers, compare time with conductors of the A. & C. air-line R. R. All trains of the N. E. R. R. while on the A. & C. A. L. railway will be under the superintendent or train-master of that road.

Trains of the N. E. R. R. will have the right of track between Lula and Rabun Gap Junction on their schedule time only; and should they, from any cause, be prevented from leaving Lula, Longview, or Rabun Gap Junction on schedule time they will not move without orders from train-master's office at Atlanta.

H. R. BERNARD,
Superintendent.

Approved:
G. J. FOREACRE, *President.*

Rules and Regulations of the Richmond & Danville R. R.

1. He must conform to all the regulations of the company and obey all orders he may receive from those having authority over him.

6. All employees are required to exercise the greatest care and watchfulness to prevent injury to persons or property, and in case of doubt or uncertainty to take the side of safety and run no risks.

13. All employees are required to make themselves familiar with the rules and regulations, and ignorance of rules will not be received as an excuse for their violation.

Engineer's signals.

3. One blast of the whistle when running is a danger signal, and is notice to apply the brakes.

General rules for trainmen.

1. In all cases of doubt take the safe course and run no risks.

6. Train employees are admonished that the greatest care-
44 fulness is expected of them at all times, and that they must be constantly on the watch to protect the interest of the company and secure the safety and comfort of the passengers.

General rules for running trains.

17. No person besides the engineer and fireman will be permitted to ride on the engine or tender without a written order from the superintendent or master of trains.

46. No extra engine, with or without a train, must exceed the maximum rate of speed allowed for passenger trains, unless by special order from the superintendent or master of trains.

Rules for engineers.

3. Each engineer must be provided with a copy of the rules and regulations of the transportation department and of the time table in effect at the time, and must carefully conform to the "general rules and regulations for the running of trains" and to the special rules attached to the time table.

4. Engineers when upon the road will be under the orders of their conductors so far as relates to the starting and stopping and the speed of their trains, taking on cars, &c., &c., but the conductor has no authority to direct an engineer to run in advance of the time given in the time table, nor will the engineer obey any order from the conductor that will endanger the safety of the train or involve a violation of the rules in force at the time.

8. When trains are delayed the time lost should be gradually made up, provided the maximum speed allowed in the special rules attached to the time table is not exceeded at any time.

The defendant here closed.

45 *Evidence Introduced by Plaintiff in Rebuttal.*

W. Z. DAVIS, introduced in rebuttal by the plaintiff, who swore:

I am now an engineer on the Richmond & Danville railroad; have been an engineer there for three years next Sept. I was a fireman on the Richmond & Danville before that time. I was on the engine with Dunlap when he was hurt. I helped him run the excursion train. I ran with him to Tallulah Falls; came back with him from Tallulah Falls to the place of the accident. I never saw any liquor in any one's possession at Clarkesville as we were going up. Dunlap and I were three or four feet apart. I was on the engine all the time; he could not have had a conversation with any one without my hearing it. Peeler was there; no one else on the engine; two or three on the tender; that was from Clarkesville to the Falls. Mr. Dunlap had no conversation with them, that I know of. I think I would have known it if he had one. No one took out a pint bottle of whiskey and a dipper and took a drink, that I saw. I do not think it could have been done without my seeing it. I was on the engine all the time and never got off. No one of the persons on the tender took out a bottle of whiskey and offered it to any one on the engine. I would have seen it had it taken place; if there had been a bottle passed around I would have seen it. I never saw a bottle at all; was with Dunlap all day. Dunlap and I went into the bar-room and took a glass of beer. I do not remember what he taken—one glass of beer, I think; that is all that we took that day—one glass apiece. We never went back that day at all. Dunlap was sitting on his box at the time, doing nothing. Dunlap was sober and all night when he started from Tallulah Falls back towards Athens; that night he ran all right. I do not think the speed exceeded twenty miles an hour at the time of the accident; there was nothing for him
46 to do. We had plenty of steam. He shut off the steam at the top of the grade as we turned over it. He had not reversed his engine before he left the track. There was nothing Dunlap could have done in the performance of his duty that he did not do to prevent the accident. The engineer's place is on the right of the engine and fireman's on the left. I do not think Dunlap could have seen the trestle at the time of the accident. I was sworn by the road about the accident in a case in Clarkesville growing out of this accident. I was not looking at Dunlap all the time the engine was running from Clarkesville to the Falls. I did not have my eyes on him all the time while we were at the Falls, but I was in his company all the time. We got there about noon. We were not apart fifteen minutes. We left at seven. I was with him from twelve (12) until seven. We were not apart more than fifteen minutes. I do not know that we were apart that long. I do not know Mr. Qnillian. I do not remember going into the bar-room but once. We went on down to the Falls as soon as we went in and came out. If he went in again I was not with him. He could not have went in there again for we were not around the hotel. I never went there but once; that was when we first got there, and we had beer. I do not

remember who went with us. I do not know really how far it was from the point where the engine left the track to the trestle. It was about two hundred feet, I suppose.

Q. (Propounded by counsel for the def't.) Did not you swear in Clarkesville that you were in thirty or forty feet of the trestle—just about leaving the curve—when the accident took place?

—. Do not know the exact speed; think about eighteen miles an hour. I do not know about the brake, except I know she must have been on or she would have run down there before I had finished the work. I do not remember testifying to being in thirty or forty feet of the trestle.

47 We were at the foot of the grade. We were not leaving the curve. I had oiled the valve after leaving Clarkesville. He ran one-half mile before he shut the engine off, and I oiled the valve and filled it up full of wood. I could not do it in under ten minutes; and that happened before the accident. I do not know whether the brakes were on or off. The engine stopped thirty feet from the trestle. There was some whiskey given to me after the accident. Dunlap was all right at Clarkesville when we left there. I did not smell his breath. I do not know whether it smelt of whiskey or not. The number of engine was twenty-nine. The engine had been up there from the first of June, and had made daily trips over that place. We came over there every day after until eight or ten days before that. We got a tank of water up at Turnersville.

JAS. M. ANTHONY was next introduced by the plaintiff, who swore:

I have been a locomotive engineer for fifteen years. I was at work on the Northeastern road in the summer of 1882. I visited the place of the accident at nine or ten o'clock the next morning. I hauled the first iron over the road. The embankment was hardly as wide at the place of the accident as the tie. I had often spoken to Col. Foreacre about the place. He was the president of the road. The section master and I had several talks about it and examined it several times. And that track was not properly laid—the iron, ties, and so on. The ties were not sufficient for the shortness of the curve, and the iron too light for that place. The width of the fill should have been wider. The iron would give way, of course, if the track was not sufficient. When I would run the engine around there it would shove the iron out against the outside of the curve. I have seen him there spiking, after a train would go over. It would shove the rail out very near an inch after spiking it to

48 gauge, when I was running a very light engine on it. The embankment was not strong enough and the elevation gave way. The fill was not sufficient to hold the elevation up. The suddenness of the change of the curve caused a heavier strain. There were about ten tons difference between the engine we usually used and the one Dunlap was running. Dunlap's was ten tons heavier. Trotter and I tried the experiment of spiking it to gauge and running a light engine over it, and it pushed it out of gauge an inch. It was about a month before the accident. There was not much improvement on it. It was about the same at the time of the accident. I saw the cars after the accident. From the general con-

dition of affairs I do not think it could have been running over eighteen miles an hour. It is a hard matter for a man to form an opinion about the speed of a train after a wreck. Sometimes a train will be wrecked as bad when running ten miles an hour as twenty. From my knowledge of all the facts connected with the track and from my inspection of the wreck, I think the defect in the track caused the accident. I am not in the employ of the Northeastern railroad. I am now in the employ of the Georgia Pacific railroad. I had some hard feelings to the roadmaster. He had charge of the track. I do not know as they were hard. My feelings toward him now are perfectly friendly. He and I had a few words. My opinion as to the track and all these facts is based upon my experience as a locomotive engineer and what I have seen of tracks. I have worked on the track awhile about twenty-five years ago, and I have been connected with railroads ever since. I was a track hand. I obtained my knowledge since as a locomotive engineer. The reason I tried experiments was this: Trotter says to me, he says, "I cannot keep that track in line down there, and I cannot keep them spiked there." We were loading dirt on the top of the hill. He said, "I wish you would go with me." I went down there and he
49 said, "I spiked this rail this morning and you see where your coming around here while ago put it to." I said, "You did?" He said, "Yes." I said, "Spike her again and I will run her around there again." I was a locomotive engineer. Locomotives run on experiments if engineers see fit. The engine and train at the place of the accident broke the rail on the right-hand outer side and ran off on the outer side.

H. D. McDANIEL was next introduced by the plaintiff, who swore:

I am an experienced railroad and civil engineer. I have examined the place on the Northeastern road where the accident occurred since the accident. The cross-ties were eight feet. The curve is an eight-degree curve. The embankment was ten and a half feet wide; it should not have been less than fourteen feet. Jarvis, an excellent authority on this subject, requires the embankment to be not less than six feet wider than length of cross-ties, and this, too, after full allowance for washing and settling. The weight of the rail was forty-five pounds; the weight of the engine thirty-four tons. The extension of the fill beyond the cross-ties should not have been less than six feet. The elevation of the outer rail should have been four inches. The engine was too heavy for the rail. It was not safe for such an engine to run at twenty miles an hour at that place. The weight of the engine, according to Rankin and according to all of the authorities—the weight of the rail to carry a thirty-four-ton engine should not have been less than fifty-five pounds. It varies with the authorities from fifty-five to sixty-seven pounds for a thirty-four-ton engine (closeness of cross-ties does not add to strength of rail in the flange). Upon sharp curves, where the elevation of one-half inch to the degree is not continued, some other

means is always used to take the place of the elevation; such
50 as angle brace upon the cross-ties and guard rails. It is true that according to the formulas laid down in the majority of authorities the elevation of the outside rail is not required to reach one-half inch to the degree up to six degrees. For a speed of twenty miles the tables of most authorities give an elevation of a little over two inches. The practice, however, is as I have above stated.

Cross-examination:

Q. Henkie shows for fifteen miles per hour eight-degree curve. For twenty miles per hour what is it?

A. Two and one-tenth inches.

Q. His book does not correspond exactly with the former one?

A. Yes, sir.

Q. Very near it, though a fraction of an inch?

A. Yes, sir.

Q. Does not Gillespie give the same result?

A. Substantially, I think.

Q. In point of fact, does not all the recognized authorities give it?

A. No, sir.

Q. Which does not?

A. Mr. Tourtwine does not give it.

Q. He seems to be alone?

A. Another author that is not here—Shanks' book. I did have it, but I have lost it. It does not agree with these other parties. It is on page 419, in Trautwine's book.

Q. He says: "The elevation of the outer rail in curves theoretically is equal to square of velocity in feet per second multiplied by gauge in inches, divided by radius of curvature in feet multiplied by 32.2. Experience has shown that one-half an inch for each degree of def. angle (100 foot-cords) does very well for four feet and eight and five-tenth inch guage up to forty miles per hour. At sixty miles use one inch per degree. In dangerous places this may be increased for safety against high winds. Approaching the curve, raise the outer rail at the rate of one inch in about sixty or eighty feet."

A. It is the same formula.

Q. His formula is the same?

A. Yes, sir.

Q. Running up to forty miles per hour?

A. Yes, sir.

Q. When you calculate your curve you get your radius.
51 Of course you have your gauge, which is a constant quantity, and the point at which you are going to lay the track you take your maximum of speed and calculate it by that?

A. Yes, sir.

Q. And if the maximum of speed is twenty miles per hour it is the result you have given?

A. Yes, sir; but I don't know what the adopted speed of that road is.

Q. That is the elevation for twenty miles per hour?

A. Yes, sir.

T. S. MORRIS was next introduced by the plaintiff, who swore:

I knew Dunlap. He was a first-class engineer before he was hurt. From my knowledge of his character for truth and veracity I would believe him on his oath. For a thirty-four-ton engine where the ties are two feet apart the rails should be about fifty pounds. A locomotive engineer with long experience in running over a rail is a person competent to know when an engine is too heavy for the rail. I should think Mr. Dunlap a sufficient skilled engineer to know this. It is considered the duty of the chief engineer to fix the weight of rails and engines. Locomotive engineers have nothing to do with this. Knowledge of these things has no effect upon the capacity.

JOS. RENARD was next introduced by the plaintiff, who swore:

I am a practical machinist and a locomotive engineer. A rail to carry a thirty-four-ton engine should not, in my opinion, be less than fifty-five pounds. My knowledge is based upon my experience as a railroad man. Most locomotive engineers have no knowledge of the relative weights of engines and rails, as this does not come necessarily within the scope of their duty. I am acquainted with J. C. Dunlap. Before he was hurt I considered him a first-class engineer. I know his general character for truth and veracity and I would believe him upon his oath.

52 E. HOLLAND, J. J. BLACKBURN, JNO. ELSWORTH, and CHAS. C. BERRY were next introduced by the plaintiff, who swore

We know J. C. Dunlap. Before he was injured on the Northeastern road he was a first-class engineer. We are acquainted with his general character for truth and veracity and we would believe him upon his oath in a court of justice.

J. C. DUNLAP, reintroduced by the plaintiff, who swore:

There is no truth in the charge that I took any whiskey at Clarkesville or Tallulah Falls on the day of the accident. After I was hurt, while I was on the track, some one gave me some whiskey. I was conscious before any one came to me. I do not remember when the doctor came. I do not remember losing consciousness before I reached Spencer's. I had no whiskey in my possession that day. I reversed the engine after it left the track. I did not know anything of the relative weights of the engine and rails.

JAS. D. MONK was next introduced by the plaintiff by deposition, who swore:

I know when trains run fast and when slow; have ridden much on the cars and worked on trains and railroads. I was on the train that was wrecked. The train was running about eighteen miles an hour; not faster than twenty. My attention was not particularly directed to the speed of the train, but it did occur to me that the speed did not cause the accident. I worked as train hand on top of the cars for four years on the Southwestern & Chicago R. R. My duty was

to put on brakes when they were needed. I worked on Air Line Road of Ga. also.

LINDSY EDWARDS was next introduced by the plaintiff by deposition, who swore:

I was acting as brakeman on the train that day. The brakes were on at the time of the accident. They were put — as we got over the hill and struck the down-grade. The train was running
53 about twenty miles an hour. I have been a brakeman on trains for about thirteen years; am brakeman now on the Ga. R. R. My attention was particularly directed to the speed of the train.

W. D. O'FARRELL was next introduced by the plaintiff by deposition, who swore:

Have no particular knowledge of railroading and derived my knowledge of the speed of trains from riding in cars. I was on the train that was wrecked. The train was running about the usual speed that trains run at on the Northeastern road. My attention was not particularly directed to the speed of the train. I think I could have observed it if the train had been running faster than usual. I have not much experience in estimating the speed of trains.

WASH. SCOTT was next introduced by the plaintiff by deposition, who swore:

I was acting as brakeman. It was my duty to put on brakes when necessary. The brakes were on at the time of the accident. I have worked frequently as brakeman on railroads. My attention was not particularly directed to the speed of the train, but I know the rate of speed was not fast; have been brakeman for several years; speed was about twenty miles an hour at time of accident.

HIRAM CRAWFORD was next introduced by the plaintiff by deposition, who swore:

I have no particular knowledge of railroading; know speed of trains from riding on the cars and observation. I was on the train at the time of the accident. I think the train was running about twenty miles an hour at the time of the accident. My attention was not particularly directed to the speed of the train. I have not much experience in estimating the speed of trains.

Here the plaintiff closed.

54 I. After the evidence was concluded for the plaintiff and defendant and before the charge of the court began, counsel for plaintiff requested the court, in writing, to charge the jury as follows:

"If the rules of the company required a train to run at a certain speed at a particular place and the train was running at a greater speed than the speed allowed by the company and this speed contributed to cause the accident, then the plaintiff could not recover,

if the plaintiff's negligence had allowed the additional speed. If, on the other hand, he had used all proper means and no improper means to check the speed of the train; if the steam was shut off the engine and he had required the brakes put on, or if the brakes had been put on without his requirement, and these were all the proper means furnished by the company for the purpose of checking the speed of the train, and an accident nevertheless happened, the plaintiff would not be guilty of negligence for failing to check the rate of speed."

The court refused to charge the jury as requested.

II. After the evidence was concluded for the plaintiff and defendant and before the charge of the court began, counsel for plaintiff requested the court, in writing, to charge the jury as follows;

"If a railroad company employs a man to run an engine over its road when his knowledge of the road is limited, without having been misled or deceived by him as to the extent of his knowledge, then the road could only expect and require of the engineer
55 such compliance of its rules as would be possible from one with his experience exercising all care and prudence."

The court refused to charge the jury as requested.

III. The court instructed the jury as follows:

"It was his duty, if he had no air-brakes, as he admitted, to blow for brakes. If the brakes were not applied and the speed checked, to blow again, and if he saw the speed was not reduced, to reverse the engine." The plaintiff assigns said charge as error and prays the court to sign and certify said exception.

IV. The court instructed the jury as follows:

"The evidence of the plaintiff's contributory negligence being of this conclusive character, the jury is instructed to return a verdict for the defendant."

V. The court instructed the jury to return a verdict for the defendant.

VI. The jury returned a verdict in accordance with said instructions, and judgment was thereupon entered up in behalf of the
56 defendant in pursuance of said instructions; and to said instructions, verdict, and judgment the plaintiff, by his counsel, excepted and now excepts, during the term at which said case was tried and while said term is still in session, and assigns the same as error, and prays the court to sign and certify this exception.

In Open Court, July 29th, 1885.

The prayer of the plaintiff to allow and certify the foregoing exceptions is granted.

All the evidence taken on the trial is hereinbefore set forth.

The facts stated in the exceptions are true, with this proviso: The plaintiff's counsel presented his requests in writing before the charge of the court began. The court instructed the jury to find for the def't without notice to plaintiff's counsel that the requests would not be given, and there was no opportunity for counsel to except to the failure of the court to charge as requested until the

instructions were given to the jury. The exceptions, therefore, contained in Nos. 1, 2, 3, & 4 were not taken or noted during the trial.

And, with the correction herein stated, the said judge has, at the request of the counsel for plaintiff, hereby signed and certified this bill of exceptions pursuant to law, and the same is hereby certified *nunc pro tunc* and made a part of the record of said case.

EMORY SPEER,
U. S. Judge.

We agree that the within is a true, complete brief of the evidence in this case, with the exception of the fact that Mr. Lumpkin objects to "but a little below my own experience," on page 21.

HOKE SMITH,
Pl'ff's Att'y.
H. H. CARLTON,
A. S. ERWIN,
G. D. THOMAS,
POPE BARROW,
E. K. LUMPKIN, *et al.*,
Counsel for Def't.

57 United States of America to the Northeastern Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Georgia, wherein J. C. Dunlap is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this the 29th day of July, in the year of our Lord one thousand eight hundred and eighty-five.

EMORY SPEER,
U. S. Judge of the Southern District of Georgia,
Acting in the Northern District.

Filed in clerk's office July 29th, 1885.

We, Pope Barrow & E. K. Lumpkin, att'ys for the northeastern Railroad Company in case mentioned in the within citation, acknowledge due and legal service of the within citation and the reception of a copy thereof.

I waive all further or other service.

July 29th, 1885.

POPE BARROW.
E. K. LUMKIN,
Att'ys for the Northeastern Railroad Company.

[Endorsed:] No. —. J. C. Dunlap *vs.* Northeastern Railroad Company. Citation. Filed in clerk's office July 27, 1885, A. E. Buck, clerk.

58 UNITED STATES OF AMERICA, *ss:*

Circuit Court for the Northern District of Georgia.

To the honorable justices of the Supreme Court of the U. S. and judges of the circuit court:

And now comes J. C. Dunlap, by Hoke & Burton Smith, his attorneys, and complains that in the records and proceedings and also in the rendition of judgment in a suit between J. C. Dunlap, plaintiff, and The Northeastern Railroad Company, defendant, tried in the circuit court of the United States for said northern district of Georgia, at the March term thereof, A. D. eighteen hundred and eighty-five, and in which judgment was rendered against said J. D. Dunlap on the — day of June, A. D. eighteen hundred and eighty-five, manifest error hath intervened, to the great damage of the said J. C. Dunlap.

Wherefore the said J. C. Dunlap prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

Atlanta, July 29th, 1885.

HOKE & BURTON SMITH,
Plaintiff's Att'ys.

A writ of error is allowed in the above-stated case, to operate as a supersedeas on the plaintiff in error giving bond, conditioned according to law, payable to the said Northeastern Railroad Company, in the sum of two hundred and fifty dollars, to be approved by the clerk of the United States circuit court.

EMORY SPEER,
U. S. Judge.

[Endorsed:] No. —. J. C. Dunlap *vs.* Northeastern Railroad Company. Writ of error. Filed in clerk's office July 29, 1885. A. E. Buck, clerk.

59 Supreme Court of the United States.

J. C. DUNLAP *vs.* NORTHEASTERN RAILROAD COMPANY.

Know all men by these presents that we, J. C. Dunlap, principal, and Jerry Lynch, security, are held and firmly bound unto the Northeastern Railroad Company in the sum of two hundred and fifty dollars.

Now, if the said J. C. Dunlap shall well and truly prosecute his cause above stated in the Supreme Court of United States and pay all damages and costs that may be legally chargeable against him

growing out of said case, then this bond shall be void, or else of ful force.

J. C. DUNLAP. [L. S.]
By HOKE SMITH.
his
JERRY x LYNCH. [L. S.]
mark.

Signed, sealed, and acknowledged before me this July 31, 1885
Approved:

A. E. BUCK, *Clerk.*

Filed in office July 31, 1885.

A. E. BUCK, *Clerk.*

60 UNITED STATES OF AMERICA,
Northern District of Georgia:

I, Alfred E. Buck, clerk of the United States circuit court in and for the Northern District of Georgia, do hereby certify the foregoing to be a true, full, correct, and complete transcript of the proceedings had in the cause wherein J. C. Dunlap is plaintiff and The Northeastern Railroad Campany is defendant, as appears of record and now remaining of file in my office.

In testimony whereof I hereunto set my hand and seal of the said circuit court, at Atlanta, Georgia, this the 26th day of September, A. D. 1885.

[Seal U. S. Circuit Court, N. D. Georgia.]

A. E. BUCK, *Clerk.*

61 UNITED STATES OF AMERICA, } ss:
Northern District of Georgia, }

I, A. E. Buck, clerk of the United States circuit court in and for the northern district of Georgia, do hereby certify that the following and attached printing and writing is a full, true, correct, and complete copy of the original writ of error, which was duly issued on the day the same bears date, in the matter of J. C. Dunlap, plaintiff, and The Northeastern Railroad Company, defendant.

In testimony whereof I hereunto set my hand and seal of the said circuit court, at Atlanta, Ga., this the 4th day of December, A. D. 1888.

[Seal U. S. Circuit Court, N. D. Georgia.]

A. E. BUCK, *Clerk.*

62 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you

or some of you, between J. C. Dunlap, plaintiff, and The Northeastern Railroad Company, defendant, a manifest error hath happened, to the great damage of the said J. C. Dunlap, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 31st day of July, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] E. A. BUCK,
Clerk of the Circuit Court of the United States
for the Northern District of Georgia.

Allowed by—
EMORY SPEER,
U. S. Judge.

63 [Endorsed:] Sup. Court U. S. October term, 1888. No. 256. J. C. Dunlap, pl'ff in error, *vs.* The Northeastern Railroad Company. Certified copy of writ of error. Filed Dec. 7, 1888.

Endorsed on cover: N. Georgia C. C. U. S. No. 256. J. C. Dunlap, plaintiff in error, *vs.* The Northeastern Railroad Company. Filed April 22, 1886.

FILED
APR 10 1888
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 266.

J. C. DUNLAP,

Plaintiff in Error.

vs.

THE NORTHEASTERN RAILROAD COMPANY,

Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

BRIEF FOR PLAINTIFF IN ERROR.

BY

HOKE SMITH,

HIS COUNSEL.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 256.

J. C. DUNLAP,

Plaintiff in Error.

VS.

THE NORTHEASTERN RAILROAD COMPANY,

Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

BRIEF FOR PLAINTIFF IN ERROR.

BY

HOKE SMITH,

HIS COUNSEL.

STATEMENT OF CASE.

J. C. Dunlap sued the Northeastern Railroad Company for an injury received during the month of August, 1882. Dunlap was acting as engineer, pulling an excursion train for the defendant. The train left the track near Clarksville, Georgia, the engine turned over, and Dunlap was injured. Plaintiff claimed that the accident resulted from the defective condition

of the road bed. Defendant claimed that plaintiff was guilty of contributory negligence.

First. Because plaintiff was running faster than twenty miles an hour, the superintendent having instructed him not to exceed that speed.

Second. Because the rules of the Company limited speed to twelve miles an hour over trestles and bridges. (The place of the accident was shown to be about two hundred feet from a trestle.)

Third. Because plaintiff made use of intoxicating drinks while on duty.

Plaintiff met the third attack upon him by proof, showing that he had not touched intoxicating liquors while on duty, and had only taken one glass of beer while off duty, and by proof that he was free from negligence contributing to the accident.

He met the first attack upon him by showing that the train was not moving over eighteen miles an hour at the time of the accident, and that the brakes were properly applied and the steam of the engine shut off before the accident.

He met the second attack upon him by showing that he was an employe of the Richmond and Danville Railroad, detailed only two days before the accident to work for a short time on the Northeastern Railroad; that he had not been furnished and did not know the rules of the Northeastern Company; that he did not know the track; that the accident happened at night, and it was impossible for him to know where the trestles were, he having only passed over the track twice, and no amount of diligence and care could have enabled him to remember the location of each trestle; that he did not know that the trestle was ahead of him; that he could not see it up to the time of the accident. Testimony was submitted which sustained plaintiff's position.

The testimony was introduced and the argument of the case

was concluded. Then, without the slightest notice to the plaintiff, without a request from defendant's counsel, the court instructed the jury to find for the defendant.

The plaintiff presented six exceptions, but as the first four are not certified as taken pending the trial, they are not relied upon. The error which we assign, and upon which we rely, is the direction by the Court to the jury to find for the defendant. The following extracts from the charge will show the ground upon which the presiding Judge directed the verdict: "It being conceded by the testimony of the plaintiff himself, and further shown that the plaintiff, the engineer in control of the train when the accident occurred, was running the engine and train at the rate of eigtheen to twenty miles an hour within 150 feet of a trestle, wherethe conceded rule of the road commanded him to slow up and run at a rate not exceeding twelve miles an hour, this was a violation of his duty. It was his duty, if he saw the speed did not reduce, to reverse the engine, and if necessary to reduce the speed, to come to a standstill." Thus it will be seen that the presiding Judge instructed the jury to find for the defendant because the train was moving, at the time of the accident, more than twelve miles an hour, although less than twenty, and because the engineer failed to reverse his engine, although brakes were on and steam shut off.

Plaintiff insists that the rule requiring speed reduced to twelve miles at trestles was not known to plaintiff, nor was said rule of the road furnished him, nor was his knowledge of the road such as to make it possible for him to comply with the rule, nor was the proof clear that the rule existed.

Plaintiff was sent out by the Superintendent, who knew plaintiff's ignorance of the road, and gave special instructions to plaintiff which allowed him to run from eighteen to twenty miles an hour. All was done to check the train, which properly could have been done. To have reversed the engine

would have increased the danger. The view of the Court was that the violation of an existing rule created negligence, as matter of law, on the part of the plaintiff, even though the rule had never been furnished plaintiff, and plaintiff did not know of its existence; even though plaintiff's want of knowledge of the road made it impossible for him to comply with the rule; even though special orders were given plaintiff, fixing the speed at which he could run, without any reference to the rule; even though all proper appliances had been used to check the speed, and additional danger would have been the result of reversing the engine.

SPECIFICATIONS OF ERROR.

The error relied upon was the instruction by the Court to the jury to find for the ~~plaintiff~~. Def't

BRIEF OF ARGUMENT.

This was a suit by an employe injured in Georgia. The following statutory provisions are applicable:

Code of Georgia, section 3036. "Injury by co-employe If the person injured is himself an employe of the company, and the damage was caused by another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

Code of Georgia, section 2083. "Liability of railroad companies as common carriers. Railroad companies are common carriers, and liable as such. As such companies necessarily have many employes who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employes as to passengers for injuries arising from the want of such care and diligence."

FACTS.

First, the testimony in this case abundantly showed that the road bed was defective. See Record, page 26, testimony of

H. C. Trotter. See Record, page 48, testimony of James M. Anthony. See Record, page 49, testimony of H. D. McDaniel.

Second, the claim that Dunlap was intoxicated was false. See Record, page 45, testimony of W. Z. Davis. See Record, page 52, testimony of J. C. Dunlap.

Third, the claim that the train was running over twenty miles an hour is abundantly contradicted. See Record, testimony of Dunlap, page 22; of Davis, page 46; of Hall, page 36; of Scott, page 53; of Edwards, page 53; of Bernard, 38; of Anthony, page 48; of Monk, page 52; of O'Farrell page 53, and of Crawford, page 53.

Fourth, it was not contributory negligence on the part of Dunlap to run at the time and place more than twelve miles an hour if he was running twenty miles or less.

He knew nothing of the road, and the superintendent was fully aware of plaintiff's ignorance. See testimony of R. H. Bernard, page 37. Dunlap was told that he could run with a limit only of eighteen to twenty miles an hour. See testimony of Bernard, page 37. Not a word was said about reducing speed at trestles or bridges. See testimony of Bernard, page 38. The superintendent did not know that the twelve mile rule with regard to trestles and bridges was of force August, 1882. See Record, pages 37 and 38, testimony of Bernard. It was not claimed that Dunlap ever read the rules or saw them, or knew of their contents. See Record, page 38, testimony of Bernard. The superintendent told Dunlap to rely upon his conductor. See Record, page 38, testimony of Bernard. The plaintiff did not know of this rule, and ignorant as he was of the road bed, could not have followed it if he had known of it. See Record, pages 24 and 25, testimony of Dunlap. The brakes were already on. See Record, page 53, testimony of Lindsey Edwards and Wash Scott. The steam from the engine had been properly shut

off. See Record, page 45, testimony of W. Z. Davis. There was nothing else to do but reverse the engine, and that would have increased the danger. See Record, page 40, testimony of J. C.

LAW AND FACTS.

The court directed a verdict for the defendant upon the ground that the plaintiff was guilty of contributory negligence. "Contributory negligence, in its legal signification, is such an act or omission on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the jury." Beach on Contributory Negligence, section 3.

It cannot be claimed that the plaintiff was wanting in ordinary care when he failed to comply with the requirements of a rule which the greatest of care on his part would not have enabled him to carry out. As perfect care could not have complied with the rule, the failure of compliance could not constitute want of ordinary care.

In 12 American and English Railrod Cases, 223, (Advance Indiana case), *Pennsylvania R. R. vs. Roney, Admr.*, the court uses the following language: "It is the duty of an engineer to obey the rules prescribed by his employer, unless they are abrogated by the employer, or obedience is made impossible by the master's acts. If an engineer wilfully and negligently disregards the rules laid down for his guidance, he cannot recover for the injury received, although other servants of the master may have been more negligent than he; but this will not follow if the rules have been annulled by the master, or compliance with them rendered impossible." In the case at bar we deny that the rule existed, and we deny

that the plaintiff either wilfully or negligently disregarded it, if it did exist.

With much doubt shown in the testimony as to the existence of the rule, and with clear proof that the plaintiff did not negligently disregard it, Judge Speer nevertheless directed a verdict for the defendant upon the ground that the plaintiff was guilty of contributory negligence for violating the rule.

In *Jones vs. E. T. R. R. Co.* 128 U. S. 444, Mr. Justice Miller, delivering the opinion of the court, uses the following language: "It will be seen from the language that, while the court was of the opinion that the company was guilty of such negligence as would render it liable in this action, it was relieved from that liability by contributory negligence on the part of the plaintiff. It did not therefore permit the jury to pass either upon the negligence of the defendant company or the contributory negligence of the plaintiff." "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

In *Kane vs.. Northern Central Ry*, 128 U. S. 93, Mr. Justice Harlan, delivering the opinion of the court, uses the following language: "The Circuit Court proceeded upon the ground that contributory negligence upon the part of the plaintiff was so conclusively established, that it would have been compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor. If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, sustained this view, then the direction to find for the defendant was proper. But we are of the opinion that the question of contributory negligence should have been submitted to the jury."

"Without further discussion of the evidence, and without intimating what ought to be the verdict upon the issue of con-

tributory negligence, we are of opinion that the court erred in not submitting to the jury to determine whether the plaintiff in forgetting, or not recalling, at the precise moment, the fact that the car from which he attempted to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under the circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery."

We urge that the jury could have reasonably inferred from the evidence in this case that the plaintiff was in the exercise of proper care, and that it was never contemplated by the railroad company that he should undertake to carry out the rule in regard to bridges and trestles. The superintendent who sent the plaintiff out swore that he only limited him to twenty miles an hour, and that in his opinion the rate of speed at the time of the accident did not exceed eighteen miles an hour. The brakeman and the fireman swore that everything had been done to check the speed that could have been done, except reversing the engine, and the chief engineer of the road swore that to have reversed the engine at the time and place of the accident would have increased the risk. The testimony showed that the plaintiff would have been guilty of negligence if he had reversed his engine, while the learned judge directed the jury to find a verdict upon the ground that the plaintiff was guilty of negligence because he did not reverse the engine. But above all, we urge that the undisputed testimony showed plaintiff could not, by the exercise of human skill, have known where this trestle was, so as to have checked the train on that account before the accident occured. The jury was entitled to pass upon the question of contributory negligence.

HOKE SMITH,
Pltff's Atty

Office Supreme Court U. S.
FILED.
APR 17 1888
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 256.

J. C. DUNLAP, PLAINTIFF IN ERROR,

vs.

THE NORTHEASTERN RAILROAD COMPANY,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Counsel for defendant in error has just furnished me a brief in which the point is made that the exceptions cannot be considered because not taken at the time.

1st. The exceptions relied on are the fifth and sixth. These exceptions really cover but one question: Did the court commit error in directing a verdict for the defendant? We submit that the certificate of the judge, together with the language of the exceptions, show that they were taken pending the trial.

They were certified in open court *nunc pro tunc*—that is

to say, they were certified during the term after the case was finished as taken during a time previous during the trial. The judge excludes from this provision of his certificate exceptions 1, 2, 3, and 4 because they were not taken or noted during the trial. This clearly means that the other two exceptions were noted during the progress of the case at the respective times when the acts therein complained of occurred. The sixth exception declares that the counsel excepted to the instruction to find for the defendant, to the verdict, and to the judgment; and the court, by certifying that the first four exceptions were not taken or noted during the trial, substantially says that these exceptions were so taken and noted.

If it is fairly inferable from statements in the bill that exceptions were taken during the trial, this will be sufficient.

Phillips W. T. S. C. P., 215, and cases cited.

2d. But an exception to a direction to find for defendant is good, though not taken or noted during the progress of the trial.

It is a judgment which disposes of the case. The rule which requires the exception has for its reason the opportunity which it gives a judge to correct inaccuracies and prevent error. It is to give the judge an opportunity for reconsideration or further explanation.

Phelps *vs.* Mayer, 15 How., 160.

Instructing to find verdict has superseded the ancient practice of demurrer to the evidence, and should be tested by same rules.

Pleasant *vs.* Fants, 22 Wall., 121.

Richardson *vs.* Boston, 19 How., 669.

By demurrer to evidence court is substituted in place of jury, and the judgment of the court stands in the place of the verdict of the jury.

Bank of U. S. *vs.* Smith, 11 Wheat., 171.

Sugden *vs.* Williams, 20 How., 436.

Ruling of the court in sustaining or overruling a demurrur to the declaration may be re-examined without a bill of exceptions, because the error is apparent on the face of the record.

Rodgers *vs.* Burlington, 3 Wallace, 661.

When the facts are specially found by the court no exception is necessary.

St. Louis *vs.* Ferry Co., 11 Wallace, 423.

Phil., 217.

Errors patent upon the record are open to revision without exception taken below.

Bennett *vs.* Butterworth, 4 How., 674.

Coughlin *vs.* Dis. Co., 11 Otto, 7.

In. Co. *vs.* Piage, 16 Wallace, 386.

When the whole record is before the court any exception can be taken in this court which could have been taken below.

Garland *vs.* Davis, 4 How., 143.

Minor *vs.* Tillotson, 1 How., 287–'90.

If the charge is ambiguous, request should be presented to have it made clear, but if it directs a verdict he need not then take exception.

Improvement Co. *vs.* Munson, 14 Wall., 442.

HOKE SMITH,

Plaintiff's Attorney.

FILED
APR 13 1889
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM. 1888. No. 256.

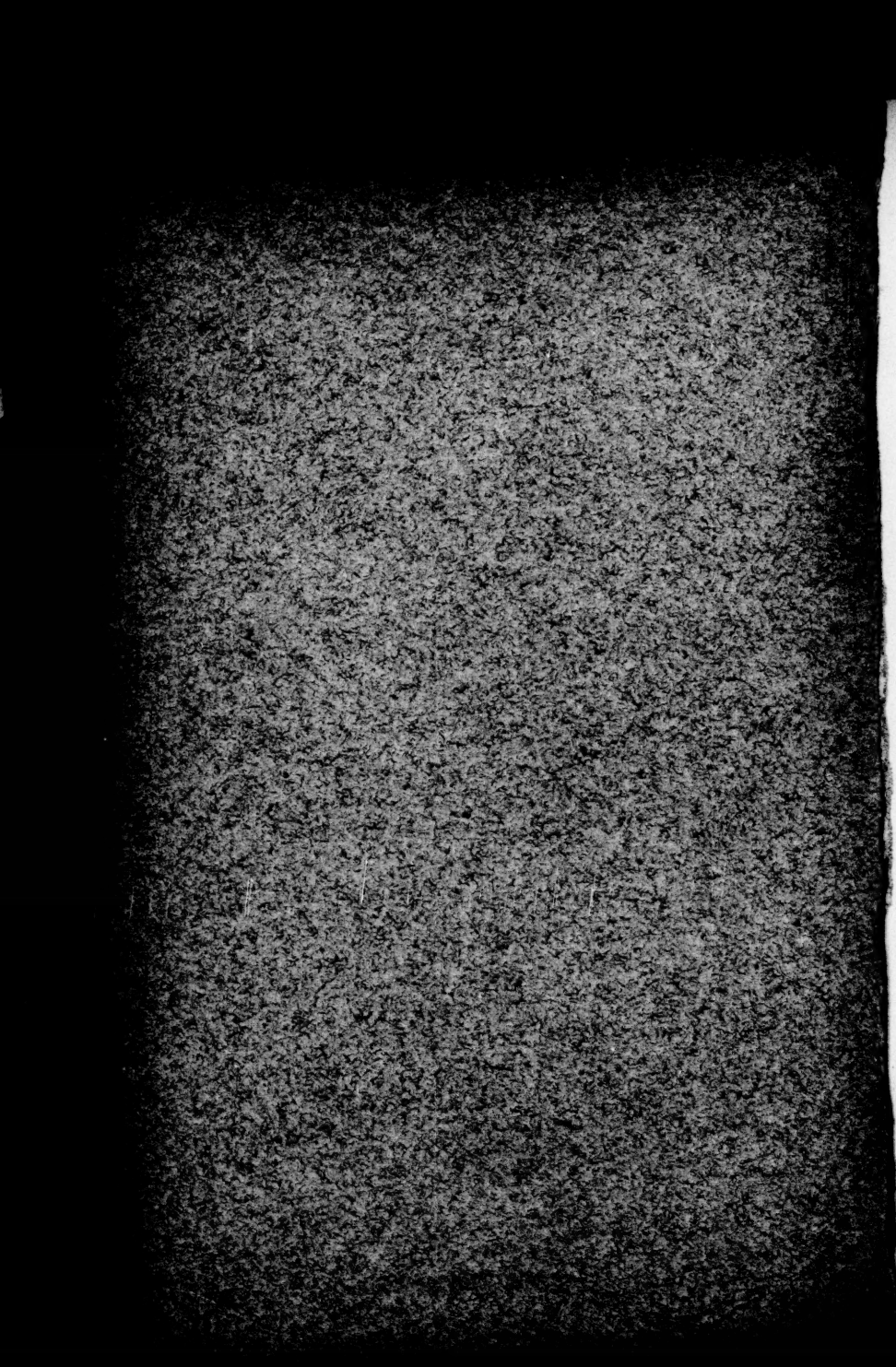
J. C. DUNLAP.

vs.

THE NORTHEASTERN R. R. CO.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

BRIEF OF POPE BARROW, FOR THE DEFENDANT IN ERROR.



J. C. DUNLAP,

vs.

THE NORTHEASTERN R. R. CO.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

BRIEF OF POPE BARROW, FOR THE DEFENDANT IN ERROR.

J. C. DUNLAP,

vs.

THE NORTHEASTERN R. R. CO

In Error to the Circuit Court of the United States for the Northern District of Georgia.

BRIEF OF POPE BARROW, FOR THE DEFENDANT IN ERROR.

This was an action by an employee of a railroad company against the company for personal injuries sustained in an accident. He was the engineer in charge of an engine which ran off the track and hurt him.

Declaration, page 1.

Testimony of Dunlap, page 14.

Testimony of Bernard, pages 23-24.

He was drunk:

Testimony of Bone, page 17.
" " Wimby, page 18.
" " J. G. Elrod, page 18.
" " Quillian, page 18.
" " Taylor. page 18.
" " J. B. Elrod, page 19.
" " Culp, page 19.
" " Hardeman, page 19.

It happened at a trestle. The engine stopped within thirty feet of it.

Testimony of Davis, page 33.

Dunlap admits that it ran off within one hundred feet of the trestle.

Testimony of Dunlap, page 15.

He knew there was a trestle somewhere there. He had been over the place three times before within three days previous, twice with the same engine.

Testimony of Dunlap, page 15.

He ran down grade two miles without blowing for brakes, or making any attempt to check his speed.

Testimony of Dunlap, page 16.

He admits that he was running between 18 and 20 miles an hour at the time of the accident:

Testimony of Dunlap, page 15.

He was really running 30 or 40 miles an hour:

Testimony of Wilhite, page 19.
" " Browning, pages 19 and 20.
" " Jester, page 20.
" " Gann, page 20.
" " Booth, page 20.
" " Nichols, page 20.
" " Cheney, page 21.

The speed caused the accident:

Testimony of Cheney, page 21.

The rules required him to come down to 10 miles an hour before crossing the trestle.

North-Eastern Train Rules, page 30.

Or by the R. & D. Train Rules, 12 miles.

R. & D. R. R. Co. Train Rules, page 27.

He had the pamphlet of rules in his possession.

Had been engineer on R. & D. R. R. about a year.

Testimony of Dunlap, page 15.

I.

No question is presented by this bill of exceptions which calls for a decision by this Court. No exceptions were taken at the trial by plaintiff's attorney to any ruling of the Court, or to any instructions given to the jury, or to the failure or refusal of